INTERNATIONAL LAW.

RECENT SUPREME COURT DECISIONS

AND

OTHER OPINIONS AND PRECEDENTS.

PREPARED UNDER THE DIRECTION OF THE
UNITED STATES NAVAL WAR COLLEGE.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1904.

NOTE.

These decisions and other precedents, including those arising during the Spanish-American war, were originally compiled by Captain C. H. Stockton, U. S. Navy, under the direction of the United States Naval War College. With some additions they have been arranged and prepared for publication by the college staff.

March, 1904.

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Case of United States v. Rodgers.

CERTIFICATE OF DIVISION IN OPINION FROM THE EASTERN DISTRICT OF MICHIGAN.

(Vol. 150, United States Reports, p. 249. Decided November 20, 1893. Mr. Justice Field delivered the opinion of the court.)

Statement of the case.

In February, 1888, the defendant, Robert S. Rodgers and others, were indicted in the District Court of the United States for the Eastern District of Michigan for assaulting, in August, 1887, with a dangerous weapon, one James Downs, on board of the steamer Alaska, a vessel belonging to citizens of the United States, and then being within the admiralty jurisdiction of the United States, and not within the jurisdiction of any particular state of the United States, viz. within the territorial limits of the Dominion of Canada.

The indictment contained six counts, charging the offence to have been committed in different ways, or with different intent, and was remitted to the Circuit Court for the Sixth Circuit of the Eastern District of Michigan. There the defendant filed a plea to the jurisdiction of the court, alleging that it had no jurisdiction of the matters charged, as appeared on the face of the indictment, and to the plea a demurrer was filed. Upon this demurrer the judges of the Circuit Court were divided in opinion, and they transmitted to this court the following certificate of division:

Certificate of division of opinion.

"*Certificate of Division of Opinion.*

"United States of America. The Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

"The United States
vs.
Robert S. Rodgers.

"The defendant in this cause was indicted on the twenty-fourth day of February, in the year of our Lord

one thousand eight hundred and eighty-eight, in the District Court of the United States for the Eastern District of Michigan, together with John Gustave Beyers and others, charged, under section 5346 of the Revised Statutes of the United States, with having made an assault with dangerous weapons upon one James Downs, the assault having taken place on the steamer Alaska, a vessel owned by citizens of the United States, while such vessel was in the Detroit River, out of the jurisdiction of any particular State of the United States and within the territorial limits of the Dominion of Canada, and the said Robert S. Rodgers, and the others indicted with him, having first, after the assault, come to the United States in the Eastern District of Michigan.

"On the twentieth day of September, in the year of our Lord one thousand eight hundred and eighty-nine, the defendant Rodgers was arrested, and on the same day the indictment was, on motion of the United States attorney for the Eastern District of Michigan, and by order of the District Court for such district, remitted to the Circuit Court for such district, and, with all proceedings theretofore taken, certified to such Circuit Court.

"On the twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty-nine, the defendant, on being called upon to plead in the Circuit Court of the United States for the Eastern District of Michigan, by permission of the court pleaded in abatement to the jurisdiction of the court, claiming that under section 5346 of the Revised Statutes of the United States the courts of the United States have no jurisdiction of offences committed in the Detroit River on a vessel of the United States within the territorial limits of the Dominion of Canada.

"The United States, by C. P. Black, United States attorney, and Charles T. Wilkins, assistant United States attorney for the Eastern District of Michigan, demurred to such plea, and the defendant joined on demurrer.

"The matter of the plea of the jurisdiction coming on to be heard in the Circuit Court of the United States for the Eastern District of Michigan, on the third day of October, in the year of our Lord eighteen hundred and eighty-nine, before the circuit and district judges, and the defendant being present in court, the said circuit and district judges were divided in opinion on the question:

Question upon which division arose.

'*Whether the courts of the United States have jurisdiction, under section 5346 of the Revised Statutes of the United*

States, to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State and within the territorial limits of the Dominion of Canada.'

"And so, at the request of the defendant and of the United States attorney for this district, the circuit and district judges do hereby at the same term state this point upon which they disagree, and hereby direct the same to be certified under the seal of the Circuit Court of the United States for the Eastern District of Michigan to the Supreme Court of the United States at its next session, for its opinion thereon.

"HOWELL E. JACKSON,
"*Circuit Judge.*
"HENRY B BROWN,
"*District Judge.*"

Section 5346 of the Revised Statutes, upon which the indictment was found, is as follows:

Section 5346, Revised Statutes.

"SEC. 5346. Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars and by imprisonment at hard labor not more than three years."

The statute relating to the place of trial in this case is contained in section 730 of the Revised Statutes, which is as follows:

"SEC. 730. The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district, where the offender is found or into which he is first brought."

MR. JUSTICE FIELD delivered the opinion of the court:

Opinion.

Several questions of interest arise upon the construction of section 5346 of the Revised Statues, upon which the indictment in this case was found. The principal one is whether the term "high seas", as there used, is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream. The term was formerly used, particularly by writers on public law, and generally in official communications

Question as to meaning of term "high seas."

Former meaning.

between different governments, to designate the open, unenclosed waters of the ocean, or of the British seas, outside of their ports or havens. At one time it was claimed that the ocean, or portions of it, were subject to the exclusive use of particular nations. The Spaniards, in the 16th century, asserted the right to exclude all others from the Pacific Ocean. The Portuguese claimed, with the Spaniards, under the grant of Pope Alexander VI., the exclusive use of the Atlantic Ocean west and south of a designated line. And the English, in the 17th century, claimed the exclusive right to navigate the seas surrounding Great Britain. Woolsey on International Law, §55.

Claims in 16th and 17th centuries.

In the discussion which took place in support of and against these extravagant pretensions the term "high seas" was applied, in the sense stated. It was also used in that sense by English courts and law writers. There was no discussion with them as to the waters of other seas. The public discussions were generally limited to the consideration of the question whether the high seas, that is, the open, unenclosed seas, as above defined, or any portion thereof, could be the property or under the exclusive jurisdiction of any nation, or whether they were open and free to the navigation of all nations. The inquiry in the English courts was generally limited to the question whether the jurisdiction of the admiralty extended to the waters of bays and harbors, such extension depending upon the fact whether they constituted a part of the high seas.

Hale's definition.

In his treatise on the rights of the sea, Sir Matthew Hale says: "The sea is either that which lies within the body of a county, or without. That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and, therefore, within the jurisdiction of the sheriff or coroner. That part of the sea which lies not within the body of a county is called the main sea or ocean." De Jure Maris, c. iv. By the "main sea" Hale here means the same thing expressed by the term "high sea"—"*mare altum*," or "*le haut meer*."

American court definitions.

In *Waring* v. *Clarke*, 5 How. 440, 453, this court said that it had been frequently adjudicated in the English common law courts since the restraining statutes of Richard II. and Henry IV., "that high seas mean that portion of the sea which washes the open coast." In *United States* v. *Grush*, 5 Mason, 290, it was held by Mr. Justice Story,

in the United States Circuit Court, that the term "high seas," in its usual sense, expresses the unenclosed ocean or that portion of the sea which is without the *fauces terræ* on the sea coast, in contradistinction to that which is surrounded or enclosed between narrow headlands or promontories. It was the open, unenclosed waters of the ocean, or the open, unenclosed waters of the sea, which constituted the "high seas" in his judgment. There was no distinction made by him between the ocean and the sea, and there was no occasion for any such distinction. The question in issue was whether the alleged offences were committed within a county of Massachusetts on the sea coast, or without it, for in the latter case they were committed upon the high seas and within the statute. It was held that they were committed in the county of Suffolk, and thus were not covered by the statute.

If there were no seas other than the ocean, the term "high seas" would be limited to the open, unenclosed waters of the ocean. But as there are other seas besides the ocean, there must be high seas other than those of the ocean. A large commerce is conducted on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their open waters and their ports and havens, and to provide for offences on vessels navigating those waters and for collisions between them. The term "high seas" does not, in either case, indicate any separate and distinct body of water; but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open waters—the latter being termed the high seas.[1] In that sense the term may also be properly used in reference to the open waters of the Baltic and the Black Sea, both of which are inland seas, finding their way to the ocean by a narrow and distant channel. Indeed, wherever there are seas in fact, free to the navigation of all nations and people on their borders, their open waters outside of the portion "surrounded or enclosed between narrow headlands or promontories," on the coast, as stated by Mr. Justice Story, or "without the body of a county,"

"High seas" indicates distinction between open waters and ports, havens, and the waters enclosed between narrow headlands.

[1] "Insula *portum*.
Efficit objectu laterum, quibus omnis ab *alto*
Frangitur, inque sinus scindit sese unda reductos."
—*The Æneid, Lib.* 1, v. 159–161.

as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of water of which they are a part may be designated. Their names do not determine their character. There are, as said above, high seas on the Mediterranean, (meaning outside of the enclosed waters along its coast,) upon which the principal commerce of the ancient world was conducted and its great naval battles fought. To hold that on such seas there are no high seas, within the true meaning of that term, that is, no open, unenclosed waters, free to the navigation of all nations and people on their borders, would be to place upon that term a narrow and contracted meaning. We prefer to use it in its true sense, as applicable to the open, unenclosed waters of all seas, than to adhere to the common meaning of the term two centuries ago, when it was generally limited to the open waters of the ocean and of seas surrounding Great Britain, the freedom of which was then the principal subject of discussion. If it be conceded, as we think it must be, that the open, unenclosed waters of the Mediterranean are high seas, that concession is a sufficient answer to the claim that the high seas always denote the open waters of the ocean.

Supreme Court's interpretation of the term "high seas."

Whether the term is applied to the open waters of the ocean or of a particular sea, in any case, will depend upon the context or circumstances attending its use, which in all cases affect, more or less, the meaning of language. It may be conceded that if a statement is made that a vessel is on the high seas, without any qualification by language or circumstance, it will be generally understood as meaning that the vessel is upon the open waters of one of the oceans of the world. It is true, also, that the ocean is often spoken of by writers on public law as *the sea*, and characteristics are then ascribed to the sea generally which are properly applicable to the ocean alone; as, for instance, that its open waters are the highway of all nations. Still the fact remains that there are other seas than the ocean whose open waters constitute a free highway for navigation to the nations and people residing on their borders, and are not a free highway to other nations and people, except there be free access to those seas by open waters or by conventional arrangements.

As thus defined, the term would be as applicable to the open waters of the great Northern lakes as it is to the open waters of those bodies usually designated as seas.

The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree.

Great Lakes are essentially seas; their being tideless and fresh is nonessential.

The waters of Lake Superior, the most northern of these lakes, after traversing nearly 400 miles, with an average breadth of over 100 miles, and those of Lake Michigan, which extend over 350 miles, with an average breadth of 65 miles, join Lake Huron, and, after flowing about 250 miles, with an average breadth of 70 miles, pass into the river St. Clair; thence through the small lake of St. Clair into the Detroit River; thence into Lake Erie and, by the Niagara River, into Lake Ontario; whence they pass, by the river St. Lawrence, to the ocean, making a total distance of over 2,000 miles. Ency. Britannica, vol. 21, p. 178. The area of the Great Lakes, in round numbers, is 100,000 square miles. Ibid. vol. 14, p. 217. They are of larger dimensions than many inland seas which are at an equal or greater distance from the ocean. The waters of the Black Sea travel a like distance before they come into contact with the ocean. Their first outlet is through the Bosphorus, which is about 20 miles long and for the greater part of its way less than a mile in width, into the sea of Marmora, and through that to the Dardanelles, which is about 40 miles in length and less than four miles in width, and then they find their way through the islands of the Greek Archipelago, up the Mediterranean Sea, past the Straits of Gibraltar to the ocean, a distance, also, of over 2,000 miles.

In the *Genesee Chief case*, 12 How. 443, this court, in considering whether the admiralty jurisdiction of the United States extended to the Great Lakes, and speaking, through Chief Justice Taney, of the general character of those lakes, said: "These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is

Previous Supreme Court pronouncements in point.

carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other." (p. 453.)

After using this language, the Chief Justice commented upon the inequality which would exist, in the administration of justice, between the citizens of the States on the lakes, if, on account of the absence of tide water in those lakes, they were not entitled to the remedies afforded by the grant of admiralty jurisdiction of the Constitution, and the citizens of the States bordering on the ocean or upon navigable waters affected by the tides. The court, perceiving that the reason for the exercise of the jurisdiction did not in fact depend upon the tidal character of the waters, but upon their practical navigability for the purposes of commerce, disregarded the test of tide waters prevailing in England as inapplicable to our country with its vast extent of inland waters. Acting upon like considerations in the application of the term "high seas" to the waters of the Great Lakes, which are equally navigable, for the purposes of commerce, in all respects, with the bodies of water usually designated as seas, and are in no respect affected by the tidal or saline character of their waters, we disregard the distinctions made between salt and fresh water seas, which are not essential, and hold that the reason of the statute, in providing for protection against violent assaults on vessels in tidal waters, is no greater but identical with the reason for providing against similar assaults on vessels in navigable waters that are neither tidal nor saline. The statute was intended to extend protection to persons on vessels belonging to citizens of the United States, not only upon the high seas, but in all navigable waters of every kind out of the jurisdiction of any particular State, whether moved by the tides or free from their influence.

Reason for, and intent of, the statute.

The character of these lakes as seas was recognized by this court in the recent *Chicago Lake Front case*, where we said: "These lakes possess all the general characteris-

Chicago Lake Front case.

tics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide." "In other respects," we added, "they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes." *Illinois Central Railroad* v. *Illinois*, 146, U. S. 387,435.

One signification of the word "high", and its application.

It is to be observed also that the term "high" in one of its significations is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a "high" way. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people, must fall under the definition of "high seas" within the meaning of the statute. We may as appropriately designate the open, unenclosed waters of the lakes as the high seas of the lakes, as to designate similar waters of the ocean as the high seas of the ocean, or similar waters of the Mediterranean as the high seas of the Mediterranean.

Context of sec. 5346 lends force to the above construction.

The language of section 5346, immediately following the term "high seas," declaring the penalty for violent assaults when committed on board of a vessel in any arm of the sea or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, equally as when committed on board of a vessel on the high seas, lends force to the construction given to that term. The language used must be read in conjunction with that term, and as referring to navigable waters out of the jurisdiction of any particular State, but connecting with the high seas mentioned. The Detroit River, upon which was the steamer Alaska at the time the assault was committed, connects the waters of Lake Huron (with which, as stated above, the waters of Lake Superior and Lake Michigan join) with the waters of Lake Erie, and separates the Dominion of Canada from the United States, constituting the boundary between them, the dividing line running nearly midway between its banks, as established by commissioners, pursuant to the treaty between the two countries. 8 Stat. 274, 276. The river is about 22 miles in length and from one to three miles in

width, and is navigable at all seasons of the year by vessels of the largest size. The number of vessels passing through it each year is immense. Between the years 1880 and 1892, inclusive, they averaged from thirty-one to forty thousand a year, having a tonnage varying from sixteen to twenty-four millions.[1] In traversing the river they are constantly passing from the territorial jurisdiction of the one nation to that of the other. All of them, however, so far as transactions had on board are concerned, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong. Whilst they are on the navigable waters of the river they are within the admiralty jurisdiction of that country. This jurisdiction is not changed by the fact that each of the neighboring nations may in some cases assert its own authority over persons on such vessels in relation to acts committed by them within its territorial limits. In what cases jurisdiction by each country will be thus asserted and to what extent, it is not necessary to inquire, for no question on that point is presented for our consideration. The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquility, in which case it may assert its authority. *Wildenhus's case*, 120, U. S., 1, 12; Halleck on International Law, c. vii, § 26, p. 172. The admiralty jurisdiction of the country of the owners of the steamer upon which the offence charged was committed is not denied. They being citizens of the United States, and the steamer being upon navigable waters, it is deemed

Admiralty jurisdiction over vessels in the Detroit River.

General rule.

[1] The following statement, furnished by Colonel O. M. Poe, of the Engineer Corps, shows the traffic through Detroit River for the years indicated:

Year.	Number of vessels.	Registered tonnage.	Year.	Number of vessels.	Registered tonnage.
1880	40,521	20,235,249	1887	38,125	18,864,250
1881	35,888	17,572,240	1888	31,404	19,099,060
1882	35,199	17,872,182	1889	32,415	19,646,000
1883	40,385	17,695,174	1890	35,640	21,684,000
1884	38,742	18,045,949	1891	34,251	22,160,000
1885	34,921	16,777,828	1892	33,860	24,785,000
1886	38,261	18,968,065			

Colonel Poe adds: "This statement does not include Canadian vessels, a large number of which use this channel, nor does it include any vessels not clearing from the various custom houses. Were these included, a considerably greater showing could be made. They are not included because the statistics can not be obtained.

to be within the admiralty jurisdiction of the United States. It was, therefore, perfectly competent for Congress to enact that parties on board committing an assault with a dangerous weapon should be punished when brought within the jurisdiction of the District Court of the United States. But it will hardly be claimed that Congress by the legislation in question intended that violent assaults committed upon persons on vessels owned by citizens of the United States in the Detroit River, without the jurisdiction of any particular State, should be punished, and that similar offences upon persons on vessels of like owners upon the adjoining lakes should be unprovided for. If the law can be deemed applicable to offences committed on vessels in any navigable river, haven, creek, basin, or bay, connecting with the lakes, out of the jurisdiction of any particular State, it would not be reasonable to suppose that Congress intended that no remedy should be afforded for similar offences committed on vessels upon the lakes, to which the vessels on the river, in almost all instances, are directed, and upon whose waters they are to be chiefly engaged. The more reasonable inference is that Congress intended to include the open, unenclosed waters of the lakes under the designation of high seas. The term, in the eye of reason, is applicable to the open, unenclosed portion of all large bodies of navigable waters, whose extent can not be measured by one's vision, and the navigation of which is free to all nations and people on their borders, by whatever names those bodies may be locally designated. In some countries small lakes are called seas, as in the case of the Sea of Galilee, in Palestine. In other countries large bodies of waters, greater than many bodies denominated seas, are called lakes, gulfs, or basins. The nomenclature, however, does not change the real character of either, nor should it affect our construction of terms properly applicable to the waters of either. By giving to the term "high seas" the construction indicated, there is consistency and sense in the whole statute, but there is neither if it be disregarded. If the term applies to the open, unenclosed waters of the lakes, the application of the legislation to the case under indictment cannot be questioned, for the Detroit River is a water connecting such high seas, and all that portion which is north of the boundary line between the United States and Canada is without the jurisdiction of any State of the Union. But if they be considered as not thus applying, it is difficult to give any force to the rest of the statute without supposing that Congress

Reasonable construction of term "high seas."

intended to provide against violence on board of vessels in navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any particular State, and intentionally omitted the much more important provision for like violence and disturbances on vessels upon the Great Lakes. All vessels in any navigable river, haven, creek, basin, or bay of the lakes, whether within or without the jurisdiction of any particular State, would some time find their way upon the waters of the lakes; and it is not a reasonable inference that Congress intended that the law should apply to offences only on a limited portion of the route over which the vessels were expected to pass, and that no provision should be made for such offences over a much greater distance on the lakes.

Congress in thus designating the open, unenclosed portion of large bodies of water, extending beyond one's vision, naturally used the same term to indicate it as was used with reference to similar portions of the ocean or of bodies which had been designated as seas. When Congress, in 1790, first used that term the existence of the Great Lakes was known; they had been visited by great numbers of persons in trading with the neighboring Indians, and their immense extent and character were generally understood. Much more accurate was this knowledge when the act of March 3, 1825, was passed, 4 Stat. 115, c. 65, and when the provisions of section 5346 were reënacted in the Revised Statutes in 1874. In all these cases, when Congress provided for the punishment of violence on board of vessels, it must have intended that the provision should extend to vessels on those waters the same as to vessels on seas, technically so called. There were no bodies of water in the United States to any portion of which the term "high seas" was applicable if not to the open, unenclosed waters of the Great Lakes. It does not seem reasonable to suppose that Congress intended to confine its legislation to the high seas of the ocean, and to its navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any State, and to make no provision for offences on those vast bodies of inland waters of the United States. There are vessels of every description on those inland seas now carrying on a commerce greater than the commerce on any other inland seas of the world. And we cannot believe that the Congress of the United States purposely left for a century those who

navigated and those who were conveyed in vessels upon those seas without any protection.

The statute under consideration provides that every person who, upon the high seas or in any river connected with them, as we construe its language, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, commits, on board of any vessel belonging in whole or in part to the United States, or any citizen thereof, an assault on another with a dangerous weapon or with intent to perpetrate a felony, shall be punished, etc. The Detroit River, from shore to shore, is within the admiralty jurisdiction of the United States, and connects with the open waters of the lakes—high seas, as we hold them to be, within the meaning of the statute. From the boundary line, near its center, to the Canadian shore it is out of the jurisdiction of the State of Michigan. The case presented is therefore directly within its provisions. The act of Congress of September 4, 1890, 26 Stat. 424, c. 874, (1 Sup. to the Rev. Stat. chap. 874, p. 799,) providing for the punishment of crimes subsequently committed on the Great Lakes, does not, of course, affect the the construction of the law previously existing.

Admiralty jurisdiction over Detroit River defined.

We are not unmindful of the fact that it was held by the Supreme Court of Michigan in *People* v. *Tyler*, 7 Michigan, 161, that the criminal jurisdiction of the Federal courts did not extend to offences committed upon vessels on the lakes. The judges who rendered that decision were able and distinguished; but that fact, whilst it justly calls for a careful consideration of their reasoning, does not render their conclusion binding or authoritative upon this court. Their opinions show that they did not accept the doctrine extending the admiralty jurisdiction to cases on the lakes and navigable rivers, which is now generally, we might say almost universally, received as sound by the judicial tribunals of the country. It is true, as there stated, that, as a general principle, the criminal laws of a nation do not operate beyond its territorial limits, and that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within the admiralty jurisdiction.

(that is, within navigable waters,) though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs. Upon that subject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashburton of August, 1842. Speaking for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, while such vessel is lying in a port within the jurisdiction of a foreign State or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of

Mr. Webster on jurisdiction over vessels.

this jurisdiction, they are considerered as parts of the territory of the nation herself." 6 Webster's Works, 306, 307.

We do not accept the doctrine that, because by the treaty between the United States and Great Britain the boundary line between the two countries is run through the centre of the lakes, their character as seas is changed, or that the jurisdiction of the United States to regulate vessels belonging to their citizens navigating those waters and to punish offenses committed upon such vessels, is in any respect impaired. Whatever effect may be given to the boundary line between the two countries, the jurisdiction of the United States over the vessels of their citizens navigating those waters and the persons on board remains unaffected. The limitation to the jurisdiction by the qualification that the offenses punishable are committed on vessels in any arm of the sea, or in any river, haven, creek, basin, or bay "without the jurisdiction of any particular State," which means without the jurisdiction of any State of the Union, does not apply to vessels on the "high seas" of the lakes, but only to vessels on the waters designated as connecting with them. So far as vessels on those seas are concerned, there is no limitation named to the authority of the United States. It is true that lakes, properly so called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a State, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or States or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.

U. S. jurisdiction unaffected by fact of boundary line running through center of lakes

Great Lakes are seas in fact, however designated.

In our judgment the District Court of the Eastern District of Michigan had jurisdiction to try the defendant upon the indictment found, and it having been transferred to the Circuit Court, that court had jurisdiction to proceed with the trial, and the demurrer to its jurisdiction should have been overruled. Our opinion, in answer to the certificate, is that

> *The courts of the United States have jurisdiction, under section 5346 of the Revised Statutes, to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United*

States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada; and it will be returned to the Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan, and it is so ordered.

MR. JUSTICE GRAY and MR. JUSTICE BROWN dissenting.

CASE OF THE THREE FRIENDS.

(Vol. 166, United States Reports, p. 1. Decided March 1, 1897. MR. CHIEF JUSTICE FULLER delivered the opinion of the court.)

The steamer Three Friends was seized November 7, 1896, by the collector of customs for the district of St. John's, Florida, as forfeited to the United States under section 5283 of the Revised Statutes, and, thereupon, November 12, was libelled on behalf of the United States in the District Court for the Southern District of Florida.

The first two paragraphs of the libel alleged the seizure and detention of the vessel, and the libel then continued:

Statement of the case.

"Third. That the said steamboat or steam vessel, the 'Three Friends,' was on, to wit, on the twenty-third day of May, A. D. 1896, furnished, fitted out and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba, to cruise and commit hostilities against the subjects, citizens and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace.

"Fourth. That the said steamboat or steam vessel, 'Three Friends,' on, to wit, the twenty-third day of May, A. D. 1896, whereof one Napoleon B. Broward was then and there master, and within the said southern district of Florida, was then and there fitted out, furnished and armed, with intent that said vessel, the said 'Three Friends,' should be employed in the service of a certain people, to wit, the insurgents in the island of Cuba, otherwise called the Cuban revolutionists, to cruise and commit hostilities against the subjects, property and people of the King of Spain, in the said island of Cuba, with whom the United States are and were then at peace.

"Fifth. That the said steamboat or steam vessel, 'Three Friends,' on, to wit, on the twenty-third day of May, A. D. 1896, and whereof one N. B. Broward was

then and there master, within the navigable waters of the United States, and within the southern district of Florida and the jurisdiction of this court, was then and there, by certain persons to the attorneys of the said United States unknown, furnished, fitted out and armed, being loaded with supplies and arms and munitions of war, and it, the said steam vessel 'Three Friends,' being then and there furnished, fitted out and armed with one certain gun or guns, the exact number to the said attorneys of the United States unknown, and with munitions of war thereof, with the intent, then and there, to be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain in the island of Cuba, and with the intent to cruise and commit hostilities against the subjects, citizens and property of the King of Spain, in the said island of Cuba, and who, on the said date and day last aforesaid, and being so furnished, fitted out, and armed as aforesaid, then and there aforesaid, from the navigable waters of the United States, to wit, from St. John's River, within the southern district of Florida, and within the jurisdiction of this court aforesaid, proceeded upon a voyage to the island of Cuba aforesaid, with the intent aforesaid, contrary to the form of the statute in such case made and provided. And that by force and virtue of the acts of Congress in such case made and provided, the said steamboat or steam vessel, her tackle, engines, machinery, apparel and furniture became and are forfeited to the use of the said United States.

"Sixth. And the said attorneys say that by reason of all and singular the premises aforesaid, and that by force of the statute in such case made and provided, the aforesaid and described steamboat or steam vessel 'Three Friends,' her tackle, machinery, apparel and furniture, became and are forfeited to the use of the said United States."

And concluded with a prayer for process and monition and the condemnation of the vessel as forfeited. Attachment and monition having issued as prayed, Napoleon B. Broward and Montcalm Broward, masters and owners, intervened as claimants; applied for an appraisement of the vessel and her release on stipulation; and filed the following exceptions to the libel:

"1. Sec. 5283, for an alleged violation of which the said vessel is sought to be forfeited, makes such forfeiture dependent upon the conviction of a person for doing the

Statement of the case.

act or acts denounced in the first sentence of said section, and as a consequence of conviction of such person; whereas the allegations in said libel do not show what persons had been guilty of the acts therein denounced as unlawful.

"2. The said libel does not show the 'Three Friends' was fitted out and armed, attempted to be fitted out and armed, or procured to be fitted out and armed in violation of said section.

"3. The said libel does not show the said vessel was so fitted out and armed, or so attempted to be fitted out and armed, or so procured to be fitted out and armed or furnished, with the intent that said vessel should be employed in the service of a foreign prince, or state, or of a colony, district or people with whom the United States are at peace.

"4. The said libel does not show by whom said vessel was so fitted out.

"5. Said libel does not show in the service of what foreign prince, or state, or colony, or district, or body politic the said vessel was so fitted out.

"6. The said libel does not show that said vessel was so armed or fitted out or furnished with the intent that such vessel should be employed in the service of any body politic recognized by or known to the United States as a body politic."

The vessel was appraised at $4000 and a bond on stipulation given for $10,000, upon which she was directed to be released. The cause came on to be heard upon the exceptions to the libel, and on January 18 the following decree was entered:

"This cause coming on to be heard upon exceptions to the libel and having been fully heard and considered, it is ordered that said second, third, fifth and sixth exceptions be sustained and that the libellant have permission to amend said libel and in event said libel is not so amended within ten days the same stand dismissed and the bond herein filed be canceled."

From this decree the United States, on January 23, prayed an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, which was allowed and duly prosecuted.

The following errors were assigned:

"First. For that the court over the objection of the libellants allowed the said steam vessel 'Three Friends' to be released from custody upon the giving of bond.

"Second. For that the court erred in sustaining the 2d, 3d, 5th and 6th exceptions of the claimants to the libel of information of the libellants. Statement of the case.

"Third. For that the court erred in entering a decree dismissing the libel of information herein."

On February 1 application was made to this court for a writ of certiorari to bring up the cause from said Circuit Court of Appeals, and, having been granted and sent down, the record was returned accordingly.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court:

* * * * * * *

The libel alleged that the vessel was "furnished, fitted out and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the Government of the King of Spain, in the island of Cuba, to cruise and commit hostilities against the subjects, citizens and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace." Opinion.

The learned District Judge held that this was insufficient under section 5283, because it was not alleged "that said vessel had been fitted out with intent that she be employed in the service of a foreign prince or state, or of any colony, district or people recognized as such by the political power of the United States."

In *Wiborg* v. *United States*, 163 U. S. 632, which was an indictment under section 5286, we referred to the eleven sections from 5281 to 5291, inclusive, which constitute Title LXVII of the Revised Statutes, and said: "The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency," and the consideration of the present case arising under section 5283 confirms us in the view thus expressed. Title LXVII, Revised Statutes; as to its operation.

It is true that in giving a *résumé* of the sections, we referred to section 5283 as dealing "with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace," but that was matter of general description, and the entire scope of the section was not required to be indicated.

Usually called Neutrality Act.

The title is headed "Neutrality," and usually called by way of convenience the "Neutrality Act," as the term "Foreign Enlistment Act" is applied to the analogous British statute, but this does not operate as a restriction.

Distinction between neutrality and duty toward a nation whose domestic peace is disturbed.

Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties, but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to demand the recognition of belligerency. And, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.

Hence, as Mr. Attorney General Hoar pointed out, 13 Opinions, 177, 178, though the principal object of the act was "to secure the performance of the duty of the United States, under the law of nations, as a neutral nation in respect of foreign powers," the act is nevertheless an act "to punish certain offences against the United States by fines, imprisonment and forfeitures, and the act itself defines the precise nature of those offences."

History of the Neutrality Act.

These sections were brought forward from the act of April 20, 1818, 3 Stat. 447, c. 88, entitled "An act in addition to the 'Act for the punishment of certain crimes against the United States,' and to repeal the acts therein mentioned," which was derived from the act of June 5, 1794, 1 Stat. 381, c. 50, entitled "An act in addition to the 'Act for the punishment of certain crimes against the United States,'" and the act of March 3, 1817, 3 Stat. 370, c. 58, entitled "An act more effectually to preserve the neutral relations of the United States."

The piracy act of March 3, 1819, 3 Stat. 510, c. 77, Rev. Stat. §§ 4293, 4294, 4295, 4296, 5368, supplemented the acts of 1817 and 1818.

The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of International Law, was recommended to Congress by President Washington in his annual address on December 3, 1793; was drawn by Hamilton; and passed the Senate by the casting vote of Vice President Adams. Ann. 3d Cong. 11, 67. Its enactment grew out of the

proceedings of the then French minister, which called forth President Washington's proclamation of neutrality in the spring of 1793. And though the law of nations had been declared by Chief Justice Jay, in his charge to the grand jury at Richmond, May 22, 1793 (Wharton's State Trials, 49, 56), and by Mr. Justice Wilson, Mr. Justice Iredell and Judge Peters, on the trial of Henfield in July of that year (Id. 66, 84), to be capable of being enforced in the courts of the United States criminally, as well as civilly, without further legislation, yet it was deemed advisable to pass the act in view of controversy over that position, and, moreover, in order to provide a comprehensive code in prevention of acts by individuals within our jurisdiction inconsistent with our own authority as well as hostile to friendly powers.

Section 5283 of the Revised Statutes is as follows:

Section 5283 of the Neutrality Act.

"Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out or arming of any vessel with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States."

By referring to section three of the act of June 5, 1794, section one of the act of 1817, and section three of the act of 1818, which are given in the margin,[1] it will be seen

[1] Act of June 5, 1794: "Sec. 3. That if any person shall, within the ports, harbors, bays, rivers or other waters of the United States, fit out and arm or attempt to fit out and arm or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state

Act of 1794.

that the words "or of any colony, district or people" were inserted in the original law by the act of 1817, carried forward by the act of 1818, and so into section 5283.

Occasion of the passage of the act of 1817.

The immediate occasion of the passage of the act of March 3, 1817, appears to have been a communication, under date of December 20, 1816, from the Portuguese minister to Mr. Monroe, then Secretary of State, informing him of the fitting out of privateers at Baltimore to act against Portugal, in case it should turn out that that Government was at war with the "self-styled Government of Buenos Ayres," and soliciting "the proposition to Congress of such provisions of law as will prevent such attempts for the future." On December 26, 1816, President Madison sent a special message to Congress, in which he referred to the inefficacy of existing laws "to prevent violations of the obligations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States," and, "with a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States," recommended further legislative pro-

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to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than five thousand dollars and the term of imprisonment shall not exceed three years, and every such ship or vessel with her tackle, apparel and furniture together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof shall be forfeited, one half to the use of any person who shall give information of the offence and the other half to the use of the United States."

Act of 1817.

Act of March 3, 1817, c. 58, 3 Stat. 370: "That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming, of any such ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people to cruise or commit hostilities, or to aid or coöperate in any warlike measure whatever, against the subjects, citizens or property, of any prince or state, or of any colony, district or people with whom the United States are at peace, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the

visions. This message was transmitted to the minister December 27, and he was promptly officially informed of the passage of the act in the succeeding month of March. *Geneva Arbitration, Case of the United States*, 138. In Mr. Dana's elaborate note to § 439 of his edition of Wheaton, it is said that the words "colony, district or people" were inserted on the suggestion of the Spanish minister that the South American provinces in revolt and not recognized as independent might not be included in the word "state." Under the circumstances this act was entitled as "to preserve the neutral relations of the United States," while the title of the act of 1794 described it as "in addition" to the Crimes Act of April 30, 1790, 1 Stat. 112, c. 9, and the act of 1818 was entitled in the same way. But there is nothing in all this to indicate that the words "colony, district or people" had reference solely to communities whose belligerency had been recognized, and the history of the times, an interesting review of which has been furnished us by the industry of counsel, does not sustain the view that insurgent districts or bodies, unrecognized as belligerents, were not intended to be embraced. On the contrary, the reasonable conclusion is that the inser-

Mr. Dana on reason for inclusion of the words "colony, district or people."

court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than ten thousand dollars, and the term of imprisonment shall not exceed ten years; and every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunition and stores which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of any person who shall give information, and the other half to the use of the United States."

Act of April 20, 1818, 3 Stat. 447: "SEC. 3. That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming, of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States."

Act of 1818

tion of the words "district or people" should be attributed to the intention to include such bodies, as for instance, the so-called Oriental Republic of Artigas, and the Governments of Pétion and Christophe, whose attitude had been passed on by the courts of New York more than a year before in *Gelston* v. *Hoyt*, 13 Johns. 141, 561, which was then pending in this court on writ of error. There was no reason why they should not have been included, and it is to the extended enumeration as covering revolutionary bodies laying claim to rights of sovereignty, whether recognized or unrecognized, that Chief Justice Marshall manifestly referred in saying, in *The Gran Para*, 7 Wheat., 471, 489, that the act of 1817 "adapts the previous laws to the actual situation of the world." At all events, Congress imposed no limitation on the words "colony, district or people" by requiring political recognition.

Application of the words "colony, district or people."

Of course a political community whose independence has been recognized is a "state" under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term, then the words "colony, district or people," instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded.

And as agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the Government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a Government are not in aid of a state in the sense of the statute.

Contemporaneous decisions are not to the contrary, though they throw no special light upon the precise question.

Gelston v. *Hoyt*.

Gelston v. *Hoyt*, 3 Wheat. 246 decided at February term, 1818 (and below January and February, 1816), was an action of trespass against the collector and surveyor of the port of New York for seizing the ship American Eagle, her tackle, apparel, etc. The seizure was made July 10, 1810,

by order of President Madison, under section three of the act of 1794, corresponding to section 5283. The ship was intended for the service of Pétion against Christophe, who had divided the island of Hayti between them and were engaged in a bloody contest, but whose belligerency had not been recognized. It was held that the service of "any foreign prince or state" imported a prince or state which had been recognized by the Government, and as there was no recognition in any manner, the question whether the recognition of the belligerency of a *de facto* sovereignty would bring it within those words, did not arise.

The Estrella.

The case of *The Estrella*, 4 Wheat. 298, involved the capture of a Venezuelan privateer on April 24, 1817. There was a recapture by an American vessel, and the prize thus came before the court at New Orleans for adjudication. The privateer was found to have a regular commission from Bolivar, issued as early as 1816, but it had violated section two of the act of 1794, which is the same as section two of the act of 1818, omitting the words "colony, district or people" (and is now section 5282 of the Revised Statutes), by enlisting men at New Orleans, provided Venezuela was a state within the meaning of that act. The decision proceeded on the ground that Venezuela was to be so regarded on the theory that recognition of belligerency made the belligerent to that intent a state.

The Nueva Anna and Liebre.

In *The Nueva Anna and Liebre*, 6 Wheat. 193, the record of a prize court at "Galveztown," constituted under the authority of the "Mexican Republic," was offered in proof, and this court refused to recognize the belligerent right claimed, because our Government had not acknowledged "the existence of any Mexican Republic or state at war with Spain;" and in *The Gran Para*, 7 Wheat. 471, Chief Justice Marshall referred to Buenos Ayres as a state within the meaning of the act of 1794.

"Colony, district or people."

Even if the word "state" as previously employed admitted of a less liberal signification, why should the meaning of the words "colony, district or people" be confined only to parties recognized as belligerent? Neither of these words is used equivalent to the word "state," for they were added to enlarge the scope of a statute which already contained that word. The statute does not say *foreign* colony, district or people, nor was it necessary, for the reference is to that which is part of the dominion of a

foreign prince or state, though acting in hostility to such prince or state. Nor are the words apt if confined to a belligerent. As argued by counsel for the Government, an insurgent colony under the act is the same before as after the recognition of belligerency, as shown by the instance of the colonies of Buenos Ayres and Paraguay, the belligerency of one having been recognized but not of the other, while the statute was plainly applicable to both. Nor is district an appropriate designation of a recognized power *de facto*, since such a power would represent not the territory actually held but the territory covered by the claim of sovereignty. And the word "people," when not used as the equivalent of state or nation, must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it applicable to any consolidated political body.

United States v *Quincy.*

In *United States* v. *Quincy*, 6 Pet. 445, 467, an indictment under the third section of the act of 1818, the court disposed of the following, among other points, thus: "The last instruction or opinion asked on the part of the defendant was: That according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was at the time of the offence alleged in the indictment, a government acknowledged by the United States, and thus was a 'state' and not a 'people' within the meaning of the act of Congress under which the defendant is indicted; the word 'people' in that act being intended to describe communities under an existing government not recognized by the United States; and that the indictment therefore can not be supported on this evidence.

"The indictment charges that the defendant was concerned in fitting out the Bolivar with intent that she should be employed in the service of a foreign 'people;' that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the Executive Department of the Government of the United States before the year 1827. And therefore it is argued that the word 'people' is not properly applicable to that nation or power.

"The objection is one purely technical, and we think not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power. The words are, 'in the service of any foreign

prince or state, or of any colony, district or people.' The application of the word 'people' is rendered sufficiently certain by what follows under the videlicet, 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word 'people' is left too general. The descriptions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the videlicet only serves to explain what is doubtful and obscure in the word 'people.'"

All that was decided was that any obscurity in the word "people" as applied to a recognized government was cured by the videlicet.

Nesbitt v. *Lushington*, 4 T. R. 783, was an action on a policy of insurance in the usual form, and among the perils insured against were "pirates, rovers, thieves," and "arrests, restraints and detainments of all kings, princes and people of what nation, condition, or quality soever." The vessel with a cargo of corn was driven into a port and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates, and the maxim *noscitur a sociis* was applied by Lord Kenyon and Mr. Justice Buller. Mr. Justice Buller said: "'People' means the supreme power; 'the power of the country,' whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the name of 'pirates, rogues, thieves;' then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes, and *people* of what nation, condition, or quality soever.' Those words therefore must apply to 'nations' in their collective capacity." *Nesbitt* v. *Lushington.*

As remarked in the brief of Messrs. Richard H. Dana, Jr., and Horace Gray, Jr., filed by Mr. Cushing in *Mauran* v. *Insurance Co.*, 6 Wall. 1, the words were "doubtless originally inserted with the view of enumerating all possible forms of government, monarchical, aristocratical, and democratic."

The British Foreign Enlistment Act, 59, Geo. III, c. 69, was bottomed on the act of 1818, and the seventh section, the opening portion of which is given below,[1] corre- British Foreign Enlistment Act.

[1] "That if any person, within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and license of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out or arm, or attempt or

sponded to the third section of that act. Its terms were, however, considerably broader and left less to construction. But we think the words "colony, district or people" must be treated as equally comprehensive in their bearing here.

The Salvador. In the case of *The Salvador*, L. R. 3, P. C. 218, the Salvador had been seized under warrant of the governor of the Bahama Islands and proceeded against in the Vice Admiralty Court there for breach of that section, and was, upon the hearing of the cause, ordered to be restored, the court not being satisfied that the vessel was engaged, within the meaning of the section, in aiding parties in insurrection against a foreign government, as such parties did not assume to exercise the powers of government over any portion of the territory of such government. This decision was overruled on appeal by the Judicial Committee of the Privy Council, and Lord Cairns, delivering the opinion, said: "It is to be observed that this part of the section is in the alternative. The ship may be employed in the service of a Foreign Prince, State, or Potentate, or Foreign State, Colony, Province or part of any Province or People; that is to say, if you find any consolidated body in the Foreign State, whether it be the Potentate, who has the absolute dominion, or the Government, or a part of the Province or of the People, or the whole of the Province or the People acting for themselves, that is sufficient. But by way of alternative it is suggested that there may be a case where, although you can

endeavor to equip, furnish, fit out or arm, or procure to be equipped, furnished, fitted out or armed, or shall knowingly aid, assist or be concerned in the equipping, furnishing, fitting out or arming of any Ship or Vessel with intent or in order that such Ship or Vessel shall be employed in the service of any Foreign Prince, State or Potentate, or of any Foreign Colony, Province or part of any Province or People, or of any Person or Persons exercising or assuming to exercise any powers of Government in or over any Foreign State, Colony, Province or part of any Province or People, as a transport or store ship, or with intent to cruise or commit hostilities against any Prince, State or Potentiate, or against the subjects or citizens of any Prince, State or Potentate, or against the persons exercising or assuming to exercise the powers of Government in any Colony, Province or part of any Province or Country, or against the inhabitants of any Foreign Colony, Province or part of any Province or Country, with whom His Majesty shall not then be at war; or shall, within the United Kingdom, or any of His Majesty's dominions, or in any Settlement, Colony, Territory, Island or place belonging or subject to His Majesty, issue or deliver any Commission for any Ship or Vessel, to the intent that such Ship or Vessel shall be employed as aforesaid," etc.

not say that the Province, or the People, or a part of the Province or People are employing the ship, there yet may be some person or persons who may be exercising, or assuming to exercise, powers of Government in the Foreign Colony or State, drawing the whole of the material aid for the hostile proceedings from abroad; and, therefore, by way of alternative, it is stated to be sufficient, if you find the ship prepared or acting in the service of 'any person or persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province or part of any Province or People'; but that alternative need not be resorted to, if you find the ship is fitted out and armed for the purpose of being 'employed in the service of any Foreign State or People, or part of any Province or People.' . . .

"It may be (it is not necessary to decide whether it is or not) that you could not state who were the person or persons, or that there were any person or persons exercising, or assuming to exercise, powers of Government in Cuba, in opposition to the Spanish authorities. That may be so: their Lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the section; but their Lordships are clearly of opinion, that there is no difficulty in bringing the case under the first alternative of the section, because their Lordships find these propositions established beyond all doubt,—there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the Province or People of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents."

Meaning of the word "people" in the Neutrality Act.

We regard these observations as entirely apposite, and while the word "people" may mean the entire body of the inhabitants of a state; or the state or nation collectively in its political capacity; or the ruling power of the country; its meaning in this branch of the section taken in connection with the words "colony" and "district," covers, in our judgment any insurgent or insurrectionary "body of people acting together, undertaking and conducting hostilities," although its belligerency has not been recognized. Nor is this view otherwise than confirmed

by the use made of the same words in the succeeding part of the sentence, for they are there employed in another connection, that is, in relation to the cruising, or the commission of hostilities, "against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace;" and, as thus used, are affected by obviously different considerations. If the necessity of recognition in respect of the objects of hostilities, by sea or land, were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.

Recognition of belligerency incurs certain restraints and liabilities.

Any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the Government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals or even war, may be the consequence of failure in the performance of obligations toward a friendly power, while on the other, the recognition of belligerency involves the rights of blockade, visitation, search and seizure of contraband articles on the high seas and abandoment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.

When belligerency is recognized.

Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interest of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. *The Ambrose Light*, 25 Fed. Rep. 408; 3 Whart. Dig. Int. Law, § 381; and authorities cited.

But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.

Distinction between recognition of belligerency and of condition of revolt.

The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the

existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred.

Proclamation of the President in June, 1895.

On June 12, 1895, a formal proclamation was issued by the President and countersigned by the Secretary of State, informing the people of the United States that the island of Cuba was "the seat of serious civil disturbances accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity"; declaring that "the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established government, by accepting or exercising commissions for warlike service against it, by enlistment or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such government"; and admonishing all such citizens and other persons to abstain from any violation of these laws.

President's message, December, 1895.

In his annual message of December 2, 1895, the President said: "Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this Government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

"Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of

our neighbors, yet the plain duty of their Government is to observe in good faith the recognized obligations of international relationship. The performance of this duty should not be made more difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relations to friendly sovereign states. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the Government to honestly fulfill every international obligation, yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

July 27, 1896, a further proclamation was promulgated, and in the annual message of December 7, 1896, the President called attention to the fact that "the insurrection in Cuba still continues with all its perplexities," and gave an extended review of the situation.

Neutrality Act applies without recognition of belligerency.

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place, and it can not be doubted that, this being so, the act in question is applicable.

We see no justification for importing into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed.

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Mr. Justice Harlan dissenting.

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Case of Underhill v. Hernandez.

(Vol. 168, United States Reports, p. 250. Decided Nov. 29, 1897. Mr. Chief Justice Fuller delivered the opinion of the court.)

Statement by Mr. Chief Justice Fuller:

Statement of the case.

In the early part of 1892 a revolution was initiated in Venezuela against the administration thereof, which the revolutionists claimed had ceased to be the legitimate government. The principal parties to this conflict were those who recognized Palacio as their head and those who followed the leadership of Crespo. General Hernandez belonged to the anti-administration party, and commanded its forces in the vicinity of Ciudad Bolivar. On the 8th of August, 1892, an engagement took place between the armies of the two parties at Buena Vista, some 7 miles from Bolivar, in which the troops under Hernandez prevailed, and on the 13th of August, Hernandez entered Bolivar and assumed command of the city. All of the local officials had in the meantime left, and the vacant positions were filled by General Hernandez, who from that date and during the period of the transactions complained of was the civil and military chief of the city and district. In October the party in revolt had achieved success generally, taking possession of the capital of Venezuela October 6, and on October 23, 1892, the Crespo government, so called, was formally recognized as the legitimate government of Venezuela by the United States.

George F. Underhill was a citizen of the United States, who had constructed a waterworks system for the city of Bolivar under a contract with the government, and was engaged in supplying the place with water, and he also carried on a machinery repair business. Some time after the entry of General Hernandez, Underhill applied to him as the officer in command for a passport to leave the city. Hernandez refused this request, and requests made by others in Underhill's behalf, until October 18, when a passport was given and Underhill left the country.

This action was brought to recover damages for the detention caused by reason of the refusal to grant the passport; for the alleged confinement of Underhill to his own house; and for certain alleged assaults and affronts by the soldiers of Hernandez's army.

The cause was tried in the circuit court of the United States for the eastern district of New York, and on the

Statement of the case.

conclusion of plaintiff's case, the circuit court ruled upon the facts plaintiff was not entitled to recover, and directed a verdict for defendant on the ground that "because the acts of the defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor." Judgment having been rendered for defendant, the case was taken to the circuit court of appeals, and by that court affirmed upon the ground "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." 26 U. S. App. 573. Thereupon the cause was brought to this court on certiorari.

Mr. Chief Justice Fuller delivered the opinion of the Court:

Courts will not sit in judgment upon governmental acts of other states done within their own territories.

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Principle not confined to recognized governments.

Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of

Application of principle in civil wars.

fact. Where a civil war prevails, that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military force, generally speaking foreign nations do not assume to judge the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded are those of an independent nation. If the political revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability. *United States* v. *Rice*, 17 U. S. 4 Wheat. 246; *Fleming* v. *Page*, 50 U. S. 9 How. 603; *Thorington* v. *Smith*, 75

U. S. 8 Wall 1; *Williams* v. *Bruffy*, 96 U. S. 176; *Ford* v. *Surget* 97 U. S. 594; *Dow* v. *Johnson*, 100 U. S. 158, and other cases.

Existence of war not necessarily dependent upon an acknowledgment of belligerency.

Revolutions or insurrections may inconvenience other nations, but by accommodation to the facts the application of settled rules is readily reached. And where the fact of the existence of war is in issue in the instance of complaint of acts committed within foreign territory, it is not an absolute prerequisite that that fact should be made out by an acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof. *The Three Friends*, 166 U. S. 1.

Conditions in this case.

In this case, the archives of the state department show that civil war was flagrant in Venezuela from the spring of 1892; that the revolutionary government was recognized by the United States as the government of the country, it being, to use the language of the Secretary of State in a communication to our minister to Venezuela, "accepted by the people, in the possession of the power of the nation and fully established."

That these were facts of which the court is bound to take judicial notice, and for information as to which it may consult the Department of State, there can be no doubt. *Jones* v. *United States*, 137 U. S. 202; *Mighell* v. *Sultan of Johore*, 1 Q. B. 149.

It is idle to argue that the proceedings of those who thus triumphed should be treated as the acts of banditti or mere mobs.

We entertain no doubt upon the evidence that Hernandez was carrying on military operations in support of the revolutionary party. It may be that adherents of that side of the controversy in the particular locality where Hernandez was the leader of the movement entertained a preference for him as the future executive head of the nation, but that is beside the question. The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterward succeeded and was recognized by the United States. We think the circuit court of appeals was justified in concluding "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

Defendant's acts those of a military commander of successful party, afterwards recognized by United States.

The decisions cited on plaintiff's behalf are not in point. Cases respecting arrests by military authority in the

absence of the prevalence of war, or the validity of contracts between individuals entered into in aid of insurrection, or the right of revolutionary bodies to vex the commerce of the world on its common highway without incurring the penalties denounced on piracy, and the like—do not involve the questions presented here.

We agree with the circuit court of appeals, that "the evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces," and that "it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive;" and we concur in its disposition of the rulings below. *The decree of the Circuit Court is affirmed.*

Case of the Olinde Rodrigues.

(Vol. 174, United States Reports. Decided May 15, 1899. Mr. Chief Justice Fuller delivered the opinion of the court.)

Statement of the case.

This was a libel filed by the United States against the steamship Olinde Rodrigues and cargo in the District Court for South Carolina, in a prize cause, for violation of the blockade of San Juan, Porto Rico. The steamship was owned and claimed by La Compagnie Générale Transatlantique, a French corporation.

The Olinde Rodrigues left Havre June 16, 1898, upon a regular voyage on a West Indian itinerary prescribed by the terms of her postal subvention from the French Government. Her regular course, after touching at Paulliac, France, was St. Thomas, San Juan, Port au Platte or Puerto Plata, Cape Haitien, St. Marque, Port au Prince, Gonaives, and to return by the same ports, the voyage terminating at Havre. The proclamation of the President declaring San Juan in a state of blockade was issued June 27, 1898. The Olinde Rodrigues left Paulliac June 19, and arrived at St. Thomas July 3, 1898, and on July 4, in the morning, went into San Juan, Porto Rico. She was seen by the United States auxiliary cruiser Yosemite, then blockading the port of San Juan.

On the fifth of July, 1898, the Olinde Rodrigues came out of the port of San Juan, was signaled by the Yosemite, and on communicating with the latter asserted that she

had no knowledge of the blockade of San Juan. There- Statement of the case.
upon a boarding officer of the Yosemite entered in the log of the Olinde Rodrigues an official warning of the block ade, and she went on her way to Puerto Plata and other ports of San Domingo and Haiti. She left Puerto Plata on her return from these ports, July 16, 1898, and on the morning of July 17 was captured by the United States armored cruiser New Orleans, then blockading the port of San Juan, as attempting to enter that port. A prize crew was put on board and the vessel was taken to Charleston, South Carolina, where she was libelled, as before stated, July 22, 1898. Depositions of officers, crew and persons on board the steamship were taken by the prize commissioners *in preparatorio*, in answer to certain standing interrogatories, and the papers and documents found on board were put in evidence. Depositions of officers and men from the cruiser New Orleans were also taken *de bene esse*, but were not considered on the preliminary hearing except on a motion by the District Attorney for leave to take further proofs.

The cause having been heard on the evidence *in preparatorio*, the District Judge ruled, August 13, for reasons given, that the Olinde Rodrigues could not, under the evidence as it stood, be condemned for her entry into the blockaded port of San Juan on July 4, and her departure therefrom July 5, 1898; nor for attempting to enter the same port on July 17; but that the depositions *de bene esse* justified an order allowing further proofs, and stated also that an order might be entered, "discharging the vessel upon stipulation for her value, should the claimant so elect." 89 Fed. Rep. 105. An order was accordingly entered that the captors have ninety days to supply further proof "as to the entry of the 'Olinde Rodrigues' into the port of San Juan, Porto Rico, on July 4, 1898, and as to the courses and movements of said vessel on July 17, 1898;" and "that the claimants may thereafter have such time to offer testimony in reply as may seem proper to the court."

The cargo was released without bond, and on September 16 the court entered an order releasing the vessel on "claimants giving bond by the Compagnie Générale Transatlantique, its owners, without sureties, in the sum of $125,000 conditioned for the payment of $125,000 upon the order of the court in the event that the vessel should be condemned." The bond was not given, and the vessel remained in custody.

Statement of the case.

Evidence was taken on behalf of the United States, and the cause came on for hearing on a motion by the claimants for the discharge and restitution of the steamship on the grounds: (1) That the blockade of San Juan at the time of the capture of the Olinde Rodrigues was not an effective blockade; (2) that the Olinde Rodrigues was not violating the blockade when seized.

The District Court rendered an opinion December 13, 1898, holding that the blockade of San Juan was not an effective blockade, and entered a decree ordering the restitution of the ship to the claimants. 91 Fed. Rep. 274. From this decree the United States appealed to this court and assigned errors to the effect: (1) That the court erred in holding that there was no effective blockade of the port of San Juan on July 17, 1898; (2) that the court erred in not finding that the Olinde Rodrigues was captured while she was violating the blockade of San Juan, July 17, 1898, and in not decreeing her condemnation as lawful prize.

Mr. Chief Justice Fuller delivered the opinion of the Court:

Opinion

We are unable to concur with the learned District Judge in the conclusion that the blockade of the port of San Juan at the time this steamship was captured was not an effective blockade.

Effective blockade not dependent upon the presence of a particular force.

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris, (April 16, 1856,) was: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

This was put by Lord Russell in his note to Mr. Mason of February 10, 1861, thus: "The Declaration of Paris was in truth directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing or the like. . . . The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add, that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that Declaration." Hall's Int. Law, § 260, p. 730, note. Various opinions cited.

The quotations from the Parliamentary debates, of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: "Forces sufficient to prevent the ports being approached without exposure to a certain danger."

In *The Mercurius*, 1 C. Rob. 80, 84, Sir William Scott stated: "It is said, this passage to the Zuyder Zee was not in a state of blockade; but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The powers who formed the armed neutrality in the last war, understood blockade in this sense; and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade, when it is dangerous to attempt to enter into it." *The Mercurius.*

And in *The Frederick Molke*, 1 C. Rob. 86, the same great jurist said: "For that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice, or prohibition given to the party." *The Frederick Molke.*

Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second

of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: "A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous."

Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.

The Franciska. In *The Franciska*, 2 Spinks, 128, Dr. Lushington, in passing on the question whether the blockade imposed on the port of Riga was an effective blockade, said: "What, then, is an efficient blockade, and how has it been defined, if, indeed, the term definition can be applied to such a subject? The one definition mentioned is that egress or entrance shall be attended with evident danger; another, that of Chancellor Kent, 1 Kent's Com. 146, is, that it shall be apparently dangerous. All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree,—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the Law of Nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone."

Quotation from Hall. "It is impossible," says Mr. Hall, (§ 260,) "to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the prize courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition."

The Hoffnung. In *The Hoffnung*, 6 C. Rob. 112, 117, Sir Walter Scott said: "When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected than any blockade

would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed." And undoubtedly a blockade may be so inadequate, or the negligence of the belligerent in maintaining it may be of such a character, as to excuse neutral vessels from the penalties for its violation. Thus in the case of an alleged breach of the blockade of the island of Martinique, which had been carried on by a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, it was held that their withdrawal was a neglect which "necessarily led neutral vessels to believe these ports might be entered without incurring any risk." *The Nancy*, 1 Acton, 57, 59.

But it can not be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

Effectiveness of blockades.

As we hold than an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position can not be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law.

One vessel can maintain effective blockade.

Even as long ago as 1809, in *The Nancy*, 1 Acton, 63, where the station of the vessel was sometimes off the port of Trinity and, at others, off another port more than seven miles distant, it was ruled that: "Under particular circumstances a single vessel may be adequate to maintain the blockade of one port and co-operate with other vessels at the same time in the blockade of another neighboring port;" although there Sir William Grant relied on the opinion of the commander on that station that the force was completely adequate to the service required to be performed.

Ruling of Dr. Lushington.

The ruling of Dr. Lushington in *The Franciska*, above cited, was to that effect, and the text-books refer to other instances.

The learned District Judge, in his opinion, refers to the treaty between France and Denmark of 1742, which provided that the entrance to a blockaded port should be closed by at least two vessels or a battery on shore; to the treaty of 1760 between Holland and the Two Sicilies prescribing that at least six ships of war should be ranged at a distance slightly greater than gunshot from the entrance; and to the treaty between Prussia and Denmark of 1818, which stipulated that two vessels should be stationed before every blockaded port; but we do not think these particular agreements of special importance here, and, indeed, Ortolan, by whom they are cited, says that such stipulations cannot create a positive rule in all cases even between the parties, "since the number of vessels necessary to a complete investment depends evidently on the nature of the place blockaded." 2 Ortolan, (4th ed.) 330, and note 2.

Nor do we regard Sir William Scott's judgment in *The Arthur* (1814). 1 Dodson, 423, 425, as of weight in favor of claimants. In effect the ruling sustained the validity of the maintenance of blockade by a single ship, and the case was thus stated: "This is a claim made by one of His Majesty's ships to share as joint-captor in a prize taken in the river Ems by another ship belonging to His Majesty, for a breach of the blockade imposed by the order in council of the 26th of April, 1809. This order was, among others, issued in the way of retaliation for the measures which had been previously adopted by the French government against the commerce of this country. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships, and forming as it were an arch of circumvallation around the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itself fails altogether; but this species of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river."

Blockades are maritime blockades, or blockades by sea and land; and they may be either military or commercial, or may partake of the nature of both. The question of effectiveness must necessarily depend on the circumstances. We agree that the fact of a single capture is not decisive of the effectiveness of a blockade, but the case made on this record does not rest on that ground.

Different kinds of blockade.

We are of opinion that if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective.

Blockade effective if one cruiser renders entrance dangerous.

What then were the facts as to the effectiveness of the blockade in the case before us?

In the proclamation of June 27, 1898, occurs this paragraph: "The United States of America has instituted and will maintain an effective blockade of all ports on the south coast of Cuba, from Cape Frances to Cape Cruz, inclusive, and also of the port of San Juan, in the island of Porto Rico." (Proclamation No. 11, 30 Stat. 34.) The blockade thus announced was not of the coast of Porto Rico, but of the port of San Juan, a town of less than 25,000 inhabitants, on the northern coast of Porto Rico, with a single entrance. From June 27 to July 14, 1898, the Yosemite, a merchant ship converted into an auxiliary cruiser, blockaded the port. Her maximum speed was fifteen and one-half knots; and her armament ten 5-inch rapid firing guns, six 6-pounders, two 1-pounders, with greatest range of three and one-half miles. While the Yosemite was blockading the port she ran the armed transport Antonio Lopez aground six miles from San Juan; gave a number of neutral vessels official notice of the blockade; warned off many from the port; and on the 5th of July, 1898, wrote into the log of the Olinde Rodrigues, off San Juan, the official warning of the blockade of San Juan. On July 14 and thereafter the port was blockaded by the armored cruiser New Orleans, whose maximum speed was twenty-two knots, and her armament six 6-inch breech-loading rifles, four 4.7-inch breech-loading rifles, ten 6-pounders, four 1.5-inch guns, corresponding to 3-pounders; four 3-pounders in the tops; four 37-millimeter automatic guns, corresponding to 1-pounders. The range of her guns was five and one-half sea miles or six and a quarter statute miles. If stationary, she could command a circle of thirteen miles in diameter; if moving, at maximum speed, she could cover in five

Conditions off San Juan.

minutes any point on a circle of seventeen miles diameter; and in ten minutes any point on a circle of nineteen miles diameter; her electric search lights could sweep the sea by night for ten miles distance; her motive power made her independent of winds and currents; in these respects and in her armament and increased range of guns she so far surpassed in effectiveness the old-time war ships that it would be inadmissable to hold that even if a century ago more than one ship was believed to be required for an effective blockade, therefore this cruiser was not sufficient to blockade this port.

Attempt to enter San Juan was dangerous.

Assuming that the Olindè Rodrigues attempted to enter San Juan, July 17, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade had been pretermitted or relaxed; her commander had no right to experiment as to the practical effectiveness of the blockade, and, if he did so, he took the risk; he was believed to be making the attempt, and was immediately captured. In these circumstances the vessel can not be permitted to plead that the blockade was not legally effective.

After the argument on the motion to discharge the vessel, application was made by counsel for the claimant to the District Judge, by letter, that the Navy Department be requested to furnish the court with all letters or dispatches of the commanders of vessels blockading the port of San Juan in respect to the sufficiency of the force. And a motion was made in this court "for an order authorizing the introduction into the record of the dispatches of Captain Sigsbee and Commander Davis," dated June 27, 1898, and July 26, 1898, and published by the Navy Department in the "Appendix to the Report of the Chief of the Bureau of Navigation, 1898," pp. 224, 225, 642.

To this the United States objected on the grounds that isolated statements transmitting official information to superior officers, and consisting largely of opinion and hearsay, were not competent evidence; that the claimants had been afforded the opportunity to offer additional proof, and had not availed themselves thereof; that if the court desired to have these papers before it, then the Government should be permitted to define their meaning by counter proofs; and certain explanatory affidavits were,

at the same time, tendered for consideration, if the motion were granted.

We need not specifically rule on the motion, or as to the admissibility of either the dispatches or affidavits, as we are satisfied that the dispatches have no legitimate tendency to establish that the blockade was not effective so far as the exclusion of trade from this port of the belligerent, whether in neutral or enemy's trading ships, was concerned. This country has always recognized the essential difference between a military and a commercial blockade. The one deals with the exclusion of trade, and the other involves the consideration of armed conflict with the belligerent. The necessity of a greater blockading force in the latter case than in the former is obvious. The difference is in kind, and in degree.

Difference between military and commercial blockade.

Our Government was originally of opinion that commercial blockades in respect of neutral powers ought to be done away with; but that view was not accepted, and during the period of the Civil War the largest commercial blockade ever known was established. Dana's Wheat. Int. Law (8th ed.) p. 671, note 232; 3 Whart. Int. Dig. §361.

The letters of Captain Sigsbee, of the St. Paul, and of Commander Davis, of the Dixie, must be read in the light of this recognized distinction; and it is to be further remarked that after the letter of Captain Sigsbee of June 27 the New Orleans was sent by Admiral Sampson officially to blockade the port of San Juan, thereby enormously increasing its efficiency.

In his report of June 28, Appendix, Rep. Bur. Nav. 220, 222, Captain Sigsbee describes an attack on the St. Paul off the port of San Juan, June 22, by the Spanish cruiser Isabella II and by the torpedoboat destroyer Terror, in which engagement the St. Paul severely injured the Terror, and drove the attacking force back into San Juan, and in his letter of June 27 he wrote: "It is advisable to constantly keep the Terror in mind as a possible active force; but, leaving her out of consideration, the services to be performed by the Yosemite, of blockading a well fortified port containing a force of enemy's vessels whose aggregate force is greater than her own, is an especially difficult one. If she permits herself to be driven away from the port, even temporarily, the claim may be set up that the blockade is broken."

It is true that in closing his letter of June 27 Captain Sigsbee said: "I venture to suggest that, in order to make the blockade of San Juan positively effective, a considerable force of vessels is needed off that port, enough to detach some to occasionally cruise about the island. West of San Juan the coast, although bold,* has outlying dangers, making it easy at present for blockade runners having local pilots to work in close to the port under the land during the night."

International-law obligations met by blockade making egress or ingress dangerous.

But we are considering the blockade of the port of San Juan and not of the coast, and while additional vessels to cruise about the island might be desirable in order that the blockade should be positively effective, we think it a sufficient compliance with the obligations of international law if the blockade made egress or ingress dangerous in fact, and that the suggestions of a zealous American naval commander, in anticipation of a conflict of armed forces before San Juan, that the blockade should be brought to the highest efficiency in a military as well as a commercial aspect, can not be allowed to have the effect of showing that the blockade which did exist was as to this vessel ineffective in point of law.

And the letter of Commander Davis of the Dixie, of July 26, 1898, appears to us to have been written wholly from the standpoint of the efficiency of the blockade as a military blockade. He says: "Captain Folger kept me through the night of the 24th, as he had information which led him to believe that an attack would be made on his ship during the night. There are in San Juan, Porto Rico, the Terror, torpedo gunboat; the Isabella II, cruiser; a torpedo boat, and a gunboat. There is also a German steamer, which is only waiting an opportunity to slip out." And further: "It is Captain Folger's opinion that the enemy will attempt to raise the blockade of San Juan, and it is my opinion that he should be reinforced there with the least possible delay."

The blockade of San Juan was effective.

In our judgment these naval officers did not doubt the effectiveness of the commercial blockade, and had simply in mind the desirability of rendering the blockade, as a

*The coast thus referred to is described in a work entitled "Navigation of the Gulf of Mexico and the Caribbean Sea," issued by the Navy Department, vol. I, 342, thus: "The shore appears to be skirted by a reef, inclosing numerous small cays and islets, over which the sea breaks violently, and it should not be approached within a distance of four miles."

military blockade, impregnable, by the possession of a force sufficient to successfully repel any hostile attack of the enemy's fleet. The blockade was practically effective; had remained so; and was legal and binding, if not raised by an actual driving away of the blockading force by the enemy; until the happening of which result the neutral trader had no right to ask whether the blockade, as against the possible superiority of the enemy's fleet, was or was not effective in a military sense.

But was this ship attempting to enter the port of San Juan, on the morning of July 17, when she was captured?

* * * * * * *

As to proofs of intent to enter San Juan.

On the proofs before us the case is this: The Olinde Rodrigues was a merchant vessel of 1675 tons, belonging to the Compagnie Générale Transatlantique, engaged in the West India trade and receiving a subsidy from the French government for carrying its mails on an itinerary prescribed by the postal authorities. Her regular course was from Havre to St. Thomas, San Juan, Puerto Plata and some other ports, returning by the same ports to Havre. She sailed from Havre, June 16 and arrived at St. Thomas, July 3, and at San Juan the morning of July 4. The proclamation of the blockade of San Juan was issued June 27, while she was on the sea. The United States cruiser Yosemite was on duty in those waters, blockading the port of San Juan, and when her commander sighted the Olinde Rodrigues coming from the eastward toward the port he made chase, but before reaching her she had turned in and was under the protection of the shore batteries. He lay outside until the next morning—the morning of July 5—when he intercepted the steamship as she was coming out, and sent an officer aboard, who made this entry in her log: "Warned off San Juan, July 5th, 1898, by U. S. S. Yosemite. Commander Emory. John Burns, Ensign, U. S. Navy." The master of the Olinde Rodrigues, whose testimony was taken *in preparatorio*, testified that when he entered San Juan, July 4, he had no knowledge that the port was blockaded, and that he first heard of it from the Yosemite on July 5, when he was leaving San Juan. After the notification he continued his voyage on the specified itinerary, arriving at Gonaives, the last port outward, on July 12. On his return voyage he stopped at the same ports, taking on freight, passengers and mail for Havre. At Cape Haytien, on July 14, he received a telegram from the agent of his company at

San Juan, telling him to hasten his arrival there by one day in order to take on fifty first class passengers, and he replied that the ship would not touch at San Juan, but would be at St. Thomas on the 17th. The purser testified that on the receipt of the cable from the consignee at San Juan, he told the captain "that since we were advised of the blockade of Porto Rico by the war ship, it was absolutely necessary not to stop;" and that "before me, the agent in Cape Haytien, sent a cablegram, saying 'Daim [the vessel] will not stop at San Juan, the blockade being notified.'"

The ship's master further testified that on the outward voyage at each port he had warned the agent of the company and the postal department that he would not touch at Porto Rico, that he would not take passengers for that point, and that the letters would be returned to St. Thomas, and that having received his clearance papers at Puerto Plata at half-past five o'clock on the evening of July 15, he did not leave until six o'clock in the morning of July 16, as he did not wish to find himself at night along the cost of Porto Rico.

The ship was a large and valuable one, belonging to a great steamship company of world-wide reputation; she was on her return voyage laden with tobacco, sugar, coffee and other products of that region; she had no cargo, passengers or mail for San Juan; she had arrived off that port in broad daylight, intentionally according to the captain; her regular itinerary on her return to France would have taken her from Port au Platte to San Juan, and from San Juan to St. Thomas, and thence to Havre, but as San Juan was blockaded and she had been warned off, and could not lawfully stop there, her route was from Port au Platte to St. Thomas, which led her directly by and not many miles from the port of San Juan.

The only possible motive which could be or is assigned for her to attempt to break the blockade is that the consignee at San Juan cabled the captain at Cape Haytien that he must stop at San Juan and take fifty first class passengers. At this time the fleet of Admiral Cervera had been destroyed; Santiago had fallen; and the long reign of Spain in the Antilles was drawing to an end. Doubtless the transportation of fifty first class passengers would prove remunerative, especially as some of them might be Spanish officials, and Spanish archives and records, and Spanish treasure, might accompany them if they escaped on the

ship. It is forcibly argued that these are reasonable inferences, and afforded a sufficient motive for the commission of the offense. But as, where the guilty intent is established, the lack of motive cannot in itself overthrow it, so the presence of motive is not in itself sufficient to supply the lack of evidence of intent. Now, in this case, the captain not only testified that he answered the cable to the effect that he should not stop at San Juan, but the purser explicitly stated that the agent at Cape Haytien sent the telegram for the captain, specifically notifying the agent at San Juan that the ship would not stop there, the blockade having been notified. It is true that the cablegram was not produced, but this was not to be expected in taking the depositions *in preparatorio*, and particularly as it was not the captain's own cablegram, but that of the agent at Cape Haytien. There is nothing in the evidence to the contrary, and under the liberality of the rules of evidence in the administration of the civil law, we must take this as we find it, and, as it stands, the argument that a temptation was held out is answered by the evidence that it was resisted.

Existence of motive insufficient without evidence of intent.

Such being the situation, and the evidence of the ship's officers being explicit that the vessel was on her way to St. Thomas and had no intention of running into San Juan, the decree in her favor must be affirmed on the merits, unless the record elsewhere furnishes evidence sufficient to overcome the conclusion reasonably deducible from the facts above stated.

Among the papers delivered to the prize master were certain bills of health, five of them by consuls of France, namely, July 9, from St. Marc, Haiti, giving the ship's destination as Havre, with intermediate ports; July 11, from Gonaives, Haiti, giving no destination; July 13, from Port au Prince, July 14, from Cape Haytien, July 15, from Puerto Plata, all naming Havre as the destination; and three by consuls of Denmark, July 13 from Port au Prince, July 14 from Cape Haytien, and July 15 from Puerto Plata, all naming St. Thomas as the destination. When the captain testified August 2, in answer to the standing interrogatories, he said nothing about any Spanish bills of health. The deposition was reread to the captain, August 3 and on the next day, August 4, he wrote to the prize commissioners desiring to correct it, saying "I fear I have badly interpreted several questions. I was asked if I had destroyed any papers on board or

Deposition of the captain and subsequent explanation regarding certain missing papers.

passports. I replied, no. The papers—documents—on board for our voyage had been delivered up proper and legal to the prize master. This is absolutely the truth, not including in the documents two Spanish bills of health, one from Port au Prince and one from Cape Haytien, which we found in opening our papers, although they had not been demanded. Not having any value for us, I said to the steward to destroy them on our arrival at Charleston, as we often do with papers that are useless to us. The regular expedition only counts from the last port, which was Puerto Plata, and I refused to take it from our agent for Porto Rico. I swear that at my examination I did not think of this, and it is only on my return from signing that the steward recalled it to me. I never sought to disguise the truth, since I wish to advise you of it as soon as possible."

Deposition of the purser.

On the 5th of August the purser answered the interrogatories, and testified that papers were given him by the consignees of the steamer at Port au Prince in a box at the time of sailing, and he found in the box one manifest of freight in ballast, and it was the same thing at Cape Haytien. At Puerto Plata the agent of the company came on board on their arrival there, and "the captain told him that there was no Spanish clearance; there was no need of it, and it was not taken." The captain said to the agent "it was not necessary, because we are not going to San Juan, being notified of the blockade." "When we arrive in a port we put up a placard of the date of departure and the time of sailing and the destination, and it was put up by my personal order from the captain that we sailed for St. Thomas directly, and it was fixed up in the night of the 15th of July. . . . We were to start on the morning of the 16th, at 6 o'clock in the morning, the captain saying he did not want to fall into the hands of the American cruisers during the night. The night before our arrival in Charleston, the doctor says to me, 'I have a bill of health, Spanish account, from Cape Haytien and Port au Prince,' and I told him I would speak to the captain and ask him what to do with these papers that I had found in assorting my papers—these papers in the pigeon holes. I told the captain that morning, and he told me that we had better destroy them, because we don't want them; that it is not our expedition, and that a true exposition is valuable only for the last port to the Spanish port."

On the 5th the captain was permitted to testify, in explanation, saying, among other things: "The reason that we did not give up the two bills of health is because they did not form a part of the clearance of our ship for our itinerary, and they were left in the pigeon holes where they were. It was at the time of our arrival at the quarantine at Charleston that the purser spoke to me of them, and I told him that they were good for nothing and to tear them up. The captain wishes to add that he did not remember the instance the other day about the destruction of the papers, that he has just told us about, and that he never had any intention to disguise anything or to deceive." Testimony of the captain as to missing papers.

Counsel for the Government insist that the intention of the Olinde to run the blockade is necessarily to be inferred from the possession of these bills of health and their alleged concealment and destruction. Doubtless the spoliation of papers, and, though to a less degree, their concealment, is theoretically a serious offense, and authorizes the presumption of an intention to suppress incriminating evidence though this is not an irrebutable presumption.

In *The Pizarro*, 2 Wheat. 227, 241, the rule is thus stated by Mr. Justice Story: "Concealment, or even spoliation of papers is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and to justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of farther proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply." *The Pizarro.* Story on spoliation and concealment of papers.

It should be remembered that the first deposition of the captain was given in answer to standing interrogatories, and not under an oral examination; that the statute (R. S. § 4622) forbade the witness "to see the interrogatories, documents, or papers, or to consult counsel, or with any persons interested, without special authority from the court;" that he was born and had always lived in France,

and was apparently not conversant with our language; indeed, he protested, as "neither understanding nor speaking English," "against all interpretation or translation contrary to my thought;" that the deposition having been reread to him the day after it was taken, he detected its want of fullness, and immediately wrote the prize commissioners on the subject with a view to correction; and that it was after this, and not before, that the purser testified.

Spoliation of papers in itself is no ground for condemnation, but evidence of the existence of such ground.

Transactions of this sort constitute in themselves no ground for condemnation, but are evidence, more or less convincing, of the existence of such ground; yet, taking the evidence in this case together, we are not prepared to hold that the explanation as to how these bills came to be received on board, neglected when the papers were surrendered, and finally torn up, was not sufficient to obviate any decisive inference of objectionable intention.

The Government further insisted that the Olinde Rodrigues refused to obey the signal from the New Orleans to heave to and stop instantly, and turned only after she had fired, and that this conclusively established an intention to violate the blockade. The theory of the Government is that the French ship purposely held on so as to get under the protection of the batteries of San Juan.

* * * * * * *

It is impossible to deny that the testimony of Captain Folger, the commander of the New Orleans, and of his officers, was extremely strong and persuasive to establish that the Olinde Rodrigues when brought to, was intentionally heading for San Juan, and pursuing her course in such a manner as to draw the blockading cruiser in range of the enemies' batteries, and yet we must consider it in view of the evidence on behalf of the captured ship, and of the undisputed facts tending to render it improbable that any design of attempting to violate the blockade was entertained. The Olinde Rodrigues had neither passengers nor cargo for San Juan; in committing the offense, she would take the risk of capture or of being shut up in that port; she was a merchantman engaged in her regular business and carrying the mails; she was owned by a widely known and reputable company; her regular course, though interrupted by the blockade of that port, led directly by it, and not far from it; and the testimony of her captain and officers denied any intention to commit a breach.

The evidence of evil intent must be clear and convincing before a merchant ship belonging to citizens of a

friendly nation will be condemned. And on a careful review of the entire evidence, we think we are not compelled to proceed to that extremity.

But, on the other hand, we are bound to say that, taking all the circumstances together and giving due weight to the evidence on behalf of the captors, probable cause for making the capture undoubtedly existed; and the case disclosed does not commend this vessel to the favorable consideration of the court.

Probable cause for capture exists when circumstances warrant suspicion.

Probable cause exists where there are circumstances sufficient to warrant suspicion though it may turn out that the facts are not sufficient to warrant condemnation. And whether they are or not cannot be determined unless the customary proceedings of prize are instituted and enforced. . . .

* * * * * * *

Résumé.

. . . This vessel had gone into San Juan on July 4, although the captain had heard of the blockade at St. Thomas, but he says he had not been officially notified of it; he telegraphed to the consul at San Juan to know, and was answered that they had received no official notice from Washington that the port was blockaded; he also heard while in San Juan that "it would be blockaded some future time, but that was not officially." The vessel was boarded and warned by the Yosemite on July 5, and the warning entered on her log. This imposed upon her the duty to avoid approaching San Juan, on her return, so nearly as to give just cause of suspicion, yet she so shaped her course as inevitably to invite it.

When the New Orleans succeeded the Yosemite her commander was informed of the facts by his predecessor, and knew that whatever the right of the Olinde Rodrigues to be in those waters, she could not lawfully place herself so near the interdicted port as to be able to break the blockade with impunity. But when he sighted her the ship was on a course to all appearance directly into that port, and steadily pursuing it. And when he signaled, the Olinde Rodrigues apparently did not obey, but seemingly persisted on her course, and that course would in a few moments have placed her within the range of the guns of Morro and of the shore batteries. In fact, when the shot was fired she was within the range of the Morro's guns. The evidence is overwhelming that she did not change her course until after the shot was fired, even though she may have stopped as soon as she saw the signal.

The turning point into the Culebra or Virgin Passage was perhaps forty miles to the eastward, and while she could have passed the port of San Juan on the course she was on, it would have been within a very short distance. The disregard of her duty to shun the port and not approach it was so flagrant that the intention to break the blockade was to be presumed though we do not hold that that was a presumption *de jure*.

The ship's log was not produced until three hours after she was boarded, and it now appears that the papers furnished the boarding officer, "said to be all the ship's papers," did not include two Spanish bills of health in which San Juan was entered as the vessel's destination. These were destroyed after the ship reached Charleston, and were, therefore, in the ship's possession when the other papers were delivered. Had they been shown, as they should have been, can it be denied that they would have furnished strong corroboration of criminal intent? Or that their destruction tended to make a case of "strong and vehement suspicion?"

Judgment.

The entire record considered, we are of the opinion that restitution of the Olinde Rodrigues should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause except the fees of counsel, should be imposed upon the ship.

The decree of the District Court will be so modified, and

As modified affirmed.

Mr. Justice McKenna dissented on the ground that the evidence justified condemnation.

Case of the Pedro.

[Vol. 175, United States Reports, p. 354. Decided December 11, 1899. Mr. Chief Justice Fuller delivered the opinion of the court.]

Statement of the case.

This was an appeal from a decree of the District Court of the United States for the Southern District of Florida condemning the steamer Pedro as lawful prize of war on a libel filed April 23, 1898.

Joint resolution concerning Cuba, approved April 20, 1898.

April 20, 1898, the President approved the following joint resolution:

"First. That the people of the Island of Cuba are, and of right ought to be, free and independent

"Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

"Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the active service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

"Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people." 30 Stat. 738.

Resolution communicated to Spain.

On the same day, the Minister of Spain to the United States requested and obtained his passports; the text of the resolution was cabled to the Minister of the United States at Madrid; and the Secretary of State by separate dispatch directed him to communicate the resolution to the Government of Spain with the formal demand of the United States therein made, and the notification that, in the absence of a response by April 23, the President would proceed without further notice to use the power and authority enjoined and conferred upon him.

Diplomatic relations broken by Spain.

April 21, the Minister of the United States at Madrid acknowledged the receipt of the Secretary's dispatch that morning, but saying that before he had communicated it he had been notified by the Minister of Foreign Affairs of Spain that diplomatic relations were broken off between the two countries, and that he had accordingly asked for his passports. The letter from the Minister of Foreign Affairs of Spain referred to was as follows:

"In compliance with a painful duty I have the honor to inform Your Excellency that the President having approved a resolution of both Chambers of the United States, which in denying the legitimate sovereignty of Spain and threatening an immediate armed intervention in Cuba, is equivalent to an evident declaration of war, the Government of His Majesty has ordered its Minister in Washington to withdraw without loss of time from the

North American territory, with all the personnel of the Legation. By this act the diplomatic relations which previously existed between the two countries are broken off, all official communications between their respective representatives ceasing, and I hasten to communicate this to Your Excellency in order that on your part you may make such dispositions as seem suitable. I beg Your Excellency to acknowledge the receipt of this note at such time as you deem proper, and I avail myself of this opportunity to reiterate to you the assurances of my distinguished consideration."

Blockade of north coast of Cuba ordered.

The Secretary of the Navy at once gave instructions to the commander in chief of the North Atlantic Squadron to "immediately institute a blockade of the North coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west; also, if in your opinion your force warrants, the port of Cienfuegos, on the south side of the island. . . . It is believed that this blockade will cut off Havana almost entirely from receiving supplies from the outside. . . . The Department does not wish the defences of Havana to be bombarded or attacked by your squadron."

Blockade instituted and proclaimed April 22.

April 22, Admiral Sampson, in command, instituted the blockade and on that day the President issued the following proclamation:

"Whereas, by a joint resolution passed by the Congress and approved April 20, 1898, and communicated to the Government of Spain, it was demanded that said Government at once relinquish its authority and government in the Island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters; and the President of the United States was directed and empowered to use the entire land and naval forces of the United States, and to call into the active service of the United States the militia of the several States to such extent as might be necessary to carry said resolution into effect; and

"Whereas, in carrying into effect said resolution, the President of the United States deems it necessary to set on foot and maintain a blockade of the North coast of Cuba, including all ports on said coast between Cardenas and Bahia Honda and the port of Cienfuegos on the South coast of Cuba:

"Now, therefore, I, William McKinley, President of the United States, in order to enforce the said resolution, do hereby declare and proclaim that the United States of America have instituted, and will maintain a blockade of

the North coast of Cuba, including ports on said coast between Cardenas and Bahia Honda and the port of Cienfuegos on the South coast of Cuba, aforesaid, in pursuance of the laws of the United States and the law of nations applicable to such cases. An efficient force will be posted so as to prevent the entrance and exit of vessels from the ports aforesaid. Any neutral vessel approaching any of said ports, or attempting to leave the same, without notice or knowledge of the establishment of such blockade, will be duly warned by the Commander of the blockading forces, who will indorse on her register the fact, and the date, of such warning, where such indorsement was made; and if the same vessel shall again attempt to enter any blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo as prize, as may be deemed advisable.

"Neutral vessels lying in any of said ports at the time of the establishment of such blockade will be allowed thirty days to issue therefrom." 30 Stat. 1769.

Spanish decree of April 23, 1898.

April 23 the Queen Regent of Spain issued a decree, in which, among other things, it was stated:

"Article I. The state of war existing between Spain and the United States terminates the treaty of peace and friendship of the 27th October, 1795, the protocol of the 12th January, 1877, and all other agreements, compacts and conventions that have been in force up to the present between the two countries.

"Article II. A term of five days from the date of the publication of the present royal decree in the Madrid Gazette is allowed to all United States ships anchored in Spanish ports, during which they are at liberty to depart."

Act of Congress of April 25, 1898.

April 25, in response to a message from the President, Congress passed the following act, which was thereupon duly and at once approved:

"First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, Anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the kingdom of Spain.

"Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect." 30 Stat. 364.

President's proclamation of April 26, 1898, prescribing rules for conduct of the war at sea.

April 26 the President issued a further proclamation, as follows:

"Whereas, By an act of Congress, approved April 25, 1898, it is declared that war exists, and that war has existed since the 21st day of April, A. D. 1898, including said day, between the United States of America and the Kingdom of Spain; and

"Whereas, It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this Government will be not to resort to privateering, but to adhere to the rules of the declaration of Paris:

"Now, therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by the Constitution and the laws, do hereby declare and proclaim:

"1. The neutral flag covers the enemy's goods, with the exception of contraband of war.

"2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.

"3. Blockades in order to be binding must be effective.

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea, by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for the voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.

"5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade." 30 Stat. 1770.

Statement of the case continued.

The steamship Pedro was built at Newcastle, England, in 1883, and, until 1887, sailed under British registry and the name of Lilburn Tower. In the latter year her name was changed to The Pedro, and she was transferred to La Compañia La Flecha, a Spanish corporation of Bilboa, Spain, and registered at that port in its name, and on October 4, 1887, obtained a royal patent from the Crown of Spain, which was issued to her as the property of the company. Thereafter she sailed under the Spanish flag and was officered and manned by Spaniards, though she was engaged in the transportation of cargo for hire as a merchant vessel under the management of G. H. Fletcher and Company of Liverpool. Her voyages began in Europe where she took cargo for Cuban ports, from which ports on discharge she proceeded to ports of the United States, where she took cargo for a port of discharge in Europe, the round trip occupying about three months. Between March 20 and March 25, 1898, she took on board at Antwerp, Belgium, some 2000 tons of cargo for Havana, Santiago de Cuba, and Cienfuegos, Cuba, of which 1700 tons was rice and the rest, hardware, empty bottles, paper, cement and general cargo.

On March 18, 1898, she was chartered to the firm of Keyser and Company, being described in the charter party as "now loading in Antwerp for Cuba," to proceed to Pensacola, Florida, or Ship Island, Mississippi, "with all convenient speed," to load a cargo of lumber for Rotterdam or Antwerp. The charter party provided that "should the vessel not be in all respects ready for cargo at her loading place on or before the 18th of May, 1898, charterers or their agents have the option of cancelling this charter. If required by charterers, lay days are not to commence at loading port before the 5th of May, 1898." Among the ship's papers was a bill of health issued by the consul of the United States at Antwerp, March 24, which described her as "engaged in Atlantic trade, and plies between Antwerp, Cuba and the United States." The bill of health concluded as follows: "I certify that the vessel has complied with the rules and regulations made under

Statement of the case.

the act of February 15, 1893, and that the vessel leaves this port bound for Pensacola, in the United States of America, via Havana, Santiago & Cienfuegos." The steamer's freight list on the voyage to Cuban ports was valued at about $7000, stated to be barely sufficient to cover the expenses of receiving, transporting and delivering that cargo, and the charter hire on the contemplated voyage from Pensacola or Ship Island to Rotterdam would have been about $25,000.

The steamer arrived at Havana on April 17, and remained there for five days, discharging about sixteen hundred tons of her cargo, and taking on some twenty tons of general merchandise for Santiago. On April 22, at about half after three o'clock in the afternoon, she left Havana for Santiago, and at six o'clock, when about fifteen miles east of the Morro, at the entrance of Havana harbor, and five miles north of the Cuban coast, was captured by the cruiser New York, one of the blockading fleet, and sent to Key West in charge of a prize crew. There she was libelled on April 23.

In due course, proofs *in preparatorio*, which embraced the ship's papers and the depositions of her master and first officer, were taken. The master appeared in behalf of the owners and made claim to the vessel, and moved the court for leave to take further proofs, presenting with the motion his test affidavit. In the affidavit it was alleged that, although a majority of the stock of La Compañia La Flecha was registered in the names of Spanish subjects and only a minority in the names of British subjects, (members of the firm of G. H. Fletcher & Company,) one of the latter had possession of all the certificates of stock, which under the charter of the company established the ownership thereof, whereby he was the "sole beneficial owner of the said steamer Pedro." And further that the steamer was transferred from the British to the Spanish registry solely for commercial reasons, "there being discriminations in favor of vessels carrying the Spanish flag in respect of commerce with the colonies of Spain, in consideration of dues paid by such steamers to the government of Spain," but that it was the intention of the British stockholders to withdraw her from the Spanish registry and from under the Spanish flag, and restore her to the British registry and the flag of Great Britain whenever the trade might be disturbed. It was also alleged that the steamer was insured "against all perils and adventures,

including the risks of war, for her full value by underwriters of Lloyds, London, and by insurance companies organized and existing under and pursuant to the laws of Great Britain, and that if the said vessel should be condemned as prize by this court the loss will rest upon and be borne by the said English underwriters." Statement of the case.

The motion was denied, the cause heard on the pleadings and the proofs taken *in preparatorio*, and a decree of condemnation entered. . . . From the decree of condemnation an appeal was prosecuted to this court.

Mr. Chief Justice Fuller delivered the opinion of the court.

When, on the twenty-second day of April, this Spanish steamer sailed from Havana, the United States and Spain were at war. Congress had adopted a resolution, April 20, demanding "that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters," and directing and empowering the President "to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect." Time was given by the Executive until April 23 for Spain to signify compliance with the demand, but the Spanish Government at once, on April 21, recognized the resolution as "an evident declaration of war," and diplomatic relations were broken off. Blockade had been proclaimed April 22, and put into effective operation at Havana, and, immediately thereupon, elsewhere, under the proclamation. And by the act of Congress of April 25, it was declared that war had existed since the twenty-first day of April. Opinion. War may exist without proclamation and before hostilities begin.

Being an enemy's vessel, the Pedro was liable to capture as lawful prize unless exempted therefrom by the terms of the proclamation of April 26. If that document in its bearing on this case could be regarded as ambiguous, a liberal construction might be indulged in, and it is urged that such liberality should in any event be accorded in view of the traditional policy of this Government in respect of the exemption of private property at sea during war.

In *The Phœnix*, 1 Spinks Eccl. & Adm. Rep. 306, 310; Spinks' Prize Cases, 1, 6, Dr. Lushington said in refer- *The Phœnix.*

ence to the relaxation of belligerent rights by official action: "If the words of the document are capable of two constructions, then I am clearly of opinion that the one most favorable to the belligerent party, in whose favor the document is issued, ought to be adopted; but the court must bear in mind that its province is not *jus dare*, but *jus dicere;* and I must again refer to the principle which I have often enunciated in this court, *verbis plane expressis omnino standum est.*"

Exemption in advance of adopted law of nations unjustified by reason of diplomatic attitude.

As applicable here, the meaning of the language used appears to us plain, and the proclamation not open to interpretation, since none is needed; nor are we justified in expanding executive action by construction because of diplomatic attitude of this Government in respect of the exemption of all property, not contraband, of citizens and subjects of nations at war with each other, an exemption which has not as yet been adopted into the law of nations.

Courts apply law as it is.

It may be that the hardships incident to the contrary view will finally be found so destitute of corresponding advantage as to lead to the general acceptance of the doctrine so long unsuccessfully advocated by our statesmen and publicists, in diminution of the evils of war, but we must apply the law as it is, and not the law as they contended it should be.

The Pedro did not come within the fourth article of the proclamation, for she was in Havana, a port of the enemy, on April 21, and not "in any port or place within the United States." She sailed from Havana for Santiago, another port of the enemy, on April 22, was captured that day, and reached Key West on April 23 as a prize of war. The suggestion that she was thus brought within the exemption requires no remark.

Nor did the fifth article of the proclamation exempt the Pedro. That article provided that "any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any Spanish port bound for any port or place in the United States, shall be permitted to enter such port or place and to discharge her cargo, and afterward forthwith to depart without molestation."

Imminence of war known before Pedro sailed.

The Pedro remained in the harbor of Havana from the 17th until the 22d of April. We think it must be assumed that she was advised of the strained relations between the United States and Spain, and the imminence of hostilities. At all events, she did not leave Havana until the day after

that designated by Congress and the President as the day on which war actually began, and which was also so regarded by the Government of Spain. She had no cargo to be discharged at any port or place in the United States, but had cargo for Santiago and Cienfuegos, Cuban ports held by the Spanish forces, and she cleared, not for Pensacola, but for Santiago. She was not within the letter of the proclamation, nor within the reasons usually assigned for the exemption as pointed out in the opinion of the District Judge, 87 Fed. Rep. 927. She had not left a foreign port in ignorance of the perilous condition of affairs, and innocently taking a course which would subject her to our power by entering one of our ports. Neither was she bringing cargo to this country for the increase of our resources, or the convenience of our citizens. On the contrary, she was sailing from one port to another port of the enemy, and all the cargo she had on board was destined for the enemy's ports. Not only this, but she took on cargo at Havana for Santiago, and was captured while thus actually trading from one enemy port to another enemy port, being herself an enemy vessel. In these circumstances the fact that the Pedro was under contract to ultimately proceed, after concluding her visits to the Spanish ports, to a port of the United States, to there load for Europe, did not bring her within the exemption of the proclamation.

Pedro an enemy ship, trading between enemy ports, without cargo except for enemy ports.

The doctrine as to continuity of voyage as laid down by this court in the cases cited by appellant has no application.

In *The Circassian*, 2 Wall. 135, it was ruled that the intent to violate a blockade, found as a fact, was not disproved by evidence of a purpose to call at a neutral port, not reached at time of capture, with ulterior destination to the blockaded port. In *The Bermuda*, 3 Wall. 514, the actual destination to a belligerent port, whether ulterior or direct, was held to determine the character of the transaction as a whole; that transhipment could not change the effect of the pursuit of a common object by a common plan; and that if the cargo was contraband its condemnation was justified, whether the voyage was to ports blockaded or to ports not blockaded; and so as to the vessel in the former case. And in *The Springbok*, 5 Wall. 1, it was held that an intention to tranship cargo at a neutral port did not save it when destined for a blockaded port; that as to cargo, both in law and intent, the

The Circassian.

The Bermuda.

The Springbok.

voyage from London to the blockaded port was one voyage, and that the liability attached from the time of sailing if captured during any part of that voyage. The solution of the question under consideration is not particularly aided by these and like decisions relating to blockade running and the transportation of contraband.

The Joseph. In *The Joseph*, 8 Cranch, 451, the American brig Joseph sailed from Boston with a cargo of freight April 6, 1812, on a voyage to Liverpool, and the north of Europe, and thence directly or indirectly to the United States. She discharged her cargo at Liverpool; then, under British license, she took a cargo from Hull to St. Petersburg, and there received news of the war between the United States and Great Britain. She afterwards sailed from St. Petersburg to London with a cargo consigned to merchants at that port, having delivered which, she sailed for the United States in ballast, and was captured not far from Boston Light, and sent into port for adjudication. Her trading with the enemy rendered her liable to condemnation as prize; but it was contended that the offensive voyage terminated at London, and that she was not taken *in delicto*. The court held, however, that whether her voyage were considered an entire one from the United States to England, thence to St. Petersburg, and thence to the United States, or as two distinct voyages, the homeward voyage being from St. Petersburg to the United States, with a deviation to London, she was captured during the same voyage in which the offence was committed, though after it was committed, and was still *in delicto*.

The Argo. *The Argo*, 1 Spinks, 375; Spinks' Prize Cases, 52, so much relied on by counsel, was an entirely different case from that presented by this record. The Argo was a vessel belonging to a Russian owner, sailing under Russian colors, and bound on a voyage from Havana to Cork. Her charter party bore date February 7 at Havana, but it was therein stipulated that she should load at Havana or Matanzas, demurrage not to be paid for forty-two running days. She took on sufficient ballast at Havana to keep her safe, and left there in February for Matanzas, where her cargo was begun to be put on board February 28 and was completed on March 30, and she cleared from that port April 2. March 29, 1854, the British Order in Coun-

cil printed in the margin[1] was issued. Dr. Lushington, adhering to the views he had expressed in *The Phœnix*, *supra*, held that the order did not contemplate that the vessel should be *laden* at the date of sailing and that the voyage was commenced at Havana to end in Great Britain, notwithstanding she took cargo at Matanzas.

Neutral ownership in enemy vessels carries with it no exemption from capture.

It was argued that the Pedro was not liable to capture and condemnation because British subjects were the legal owners of some and the equitable owners of the rest of the stock of La Compañia La Flecha, and because the vessel was insured against risks of war by British underwriters. But the Pedro was owned by a corporation incorporated under the laws of Spain; had a Spanish registry; was sailing under a Spanish flag and a Spanish license; and was officered and manned by Spaniards. Nothing is better settled than that she must, under such circumstances, be deemed to be a Spanish ship and to be dealt with accordingly. Story on Prize Courts (Pratt's Ed.) 60, 66, and cases cited. *The Friendschaft*, 4 Wheat. 105; *The Ariadne*, 2 Wheat. 143; *The Cheshire*, 3 Wall. 231; Hall Int. Law, § 169.

These stockholders were in no position to deny that when they elected to take the benefit of Spanish naviga-

British Order in Council in Crimean War.

[1] "Her Majesty, being compelled to declare war against His Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof is pleased by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within her Majesty's dominions shall be allowed until the tenth day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on before the expiration of the above term: Provided, that nothing herein contained shall extend to or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

"And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships shall be permitted to continue her voyage to any port not blockaded

tion laws and the commercial profits to be derived through discriminations thereunder against ships of other nations, they also elected to rely on the protection furnished by the Spanish flag. Nor can the alleged intention to restore the Pedro to British registry, if war rendered the change desirable, be regarded. That had not been done when the Pedro was captured.

Conclusion.

In conclusion, we are of opinion that the court below did not err in refusing to allow further proofs to be taken. The Spanish ownership was made out, and the facts that the stock of the corporation belonged legally or equitably to British subjects or that the loss of the vessel would be eventually borne by British underwriters were immaterial. Nor was there any doubt as to the movements of the Pedro and the trading in which she was actually engaged. The conclusion reached by the District Court could not have been affected by the further proofs desired to be taken.

Decree affirmed.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE BREWER, MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM, dissenting.

* * * * * * *

CASE OF THE BUENA VENTURA.

(Vol. 175, United States Reports, p. 384. Decided Dec. 11, 1899. MR. JUSTICE PECKHAM delivered the opinion of the court.)

Statement of the case.

During the late war between the United States and Spain, and on May 27, 1898, the District Court of the United States for the Southern District of Florida condemned the steamship Buena Ventura as lawful prize of war, on the ground "that the said steamship Buena Ventura was enemy's property, and was upon the high seas and not in any port or place of the United States upon the outbreak of the war, and was liable to condemnation and seizure." It was thereupon ordered that the vessel "be condemned and forfeited to the United States as lawful prize of war; but it appearing that the cargo of the said steamer was the property of neutrals and not contraband and subject to condemnation and forfeiture, it is ordered that said cargo be released and restored to the claimant or the true and lawful owners thereof."

The vessel was captured on April 22, 1898, eight or nine miles from Sand Key light, on the Florida coast, by

Statement of the case.

the United States ship of war Nashville, under the command of a line officer of the United States Navy, was brought into the port of Key West for adjudication, and was condemned upon the answers, given by the master and mate of the steamship, to standing interrogatories *in preparatorio*, and upon the documents seized on board the ship by the captors. This evidence showed that the steamship was a Spanish vessel engaged exclusively in the carrying of cargoes, and that at the time of her capture she was making a voyage under a charter party which had been concluded in Liverpool on March 23, 1898, between the agents of the owners and the agents of the charterers. By this charter party the steamship was described as "now ready to leave Cuba;" and it was agreed upon therein that the vessel should with all convenient speed proceed to Ship Island, Mississippi, and there take on a cargo of lumber, and proceed therewith, as customary, to Rotterdam. The vessel was to be at her loading place and ready for cargo on or before the 10th of April, and if she were not, the charterers had the option of cancelling the charter. Pursuant to this charter party the ship left Cuba and arrived at Ship Island about the 31st of March, and between that time and the 19th of April she had taken on her cargo, and on the latter day had sailed from Ship Island bound for Norfolk, Virginia, to take in bunker coal, the charter party giving the vessel the liberty to stop at any port on the voyage for coal, then to proceed to Rotterdam. After leaving port at Ship Island she proceeded on her voyage to Norfolk, and about half-past seven o'clock on the morning of April 22, while proceeding close to the Florida reefs, was captured as stated. She made no resistance at the time of her capture, there were no military or naval officers on board of her, and she carried no arms or munitions of war. The evidence is undisputed that the vessel, when captured, was proceeding on her voyage to Norfolk.

Previous to sailing from Ship Island she was furnished with a bill of health, in which it was stated that she was now "ready to depart from the port of Pascagoula, Mississippi, [which is the customs port of Ship Island,] for Norfolk, Virginia, and other places beyond the sea." Her manifest showed that she was bound for Norfolk. It is headed "Coast Manifest," and after a description of the cargo it continues: "Permission is hereby granted to said vessel to proceed from this port to Norfolk, in the district of Norfolk and State of Virginia, to lade bunker coal;"

Statement of the case.

and it was signed and sealed by the deputy collector of Pascagoula, district of Pearl River, Mississippi, on April 14, 1898, and the fees therefor paid.

The ship's clearance was for Norfolk, and contained the same permission to proceed there, to lade bunker coal.

There was no evidence which tended to throw any suspicion as to the destination of the vessel.

After obtaining all her papers in the regular way, and having cleared at the custom house on April 14, 1898, she was detained at Ship Island by low water until between eight and nine o'clock A. M. of April 19, 1898, when she sailed over the bar and proceeded on her voyage.

In the test affidavit of the master he swore that at all times before the ship's seizure he and all of his officers were ignorant that war existed between Spain and the United States, and the vessel at the time of her capture was following the ordinary course of her voyage.

The various proceedings of Congress, proclamations of the President, letters of the Secretary of State, and other public documents connected with occurrences leading up to the breaking out of hostilities between this country and Spain are contained in this record, but are also set forth at sufficient length in the statement of facts contained in the report of the case of *The Pedro*, *ante* 355 [see p. 58, preceding], and it is unnecessary, therefore, to repeat them.

After a hearing the District Court on the 27th of May, 1898, condemned the vessel, 87 Fed. Rep. 927, which was sold under the final decree of the court, and her proceeds deposited to abide the event of an appeal, which was then taken on the part of the claimant.

Opinion.

Mr. Justice Peckham, after stating the facts as above, delivered the opinion of the court.

The Buena Ventura was a Spanish merchant vessel in the peaceful prosecution of her voyage to Norfolk, Virginia, from Ship Island, in the State of Mississippi, when, on the morning of April 22, 1898, she was captured as lawful prize of war, of the existence of which, up to the moment of capture, all her officers were ignorant. She was not violating any blockade, carried neither contraband of war nor any officer in the military or naval service of the enemy, nor any dispatch of or to the Spanish Government, and attempted no resistance when captured.

Historic attitude of the United States in favor of mitigating the horrors of war as to all non-combatants.

The facts regarding this vessel place her within that class which this Government has always desired to treat with great liberality. It is, as we think, historically

accurate to say that this Government has always been, in its views, among the most advanced of the Governments of the world in favor of mitigating, as to all non-combatants, the hardships and horrors of war. To accomplish that object it has always advocated those rules which would in most cases do away with the right to capture the property of an enemy on the high seas. 3 Wharton's International Law Digest, § 342. The refusal of this Government to agree to the Declaration of Paris was founded in part upon the refusal of the other Governments to agree to the proposition exempting private property, not contraband, from capture upon the sea.

It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time or just prior to the time when hostilities between the two countries broke out, would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive, it is necessary when his proc lamation has been issued, which lays down rules for treatment of merchant vessels, to put upon the words used therein the most liberal and extensive interpretation of which they are capable; and where there are two or more interpretations which possibly might be put upon the language, the one that will be most favorable to the belligerent party, in whose favor the proclamation is issued, ought to be adopted.

Liberal interpretation of Executive proclamations.

This is the doctrine of the English courts, as exemplified in *The Phœnix*, Spink's Prize Cases, 1, 5, and *The Argo*, Id. p. 52. It is the doctrine which this court believes to be proper and correct.

To ascertain the intention of the Executive we must look to the words which he uses. If the language is plain and clear, and the meaning not open to discussion, there is an end of the matter. If, however, such is not the case, and interpretation or construction must be resorted to for the purpose of ascertaining the precise meaning of the text, it is our duty with reference to this public instrument to make it as broad in its exemptions as is reasonably possible.

If inferences must be drawn therefrom in order to render certain the limitations intended, those inferences should be, so far as is possible, in favor of the claimant in behalf of the owners of the vessel.

The language to justify an exemption of the vessel must, it is true, be found in the proclamation; yet if such language fail to state with entire clearness the full extent and

scope of such exemption, thereby making it necessary that some interpretation thereof should be given, it is proper to refer to the prior views of the Executive Department of the Government as evidence of its policy regarding the subject. This is not for the purpose of enlarging the natural and ordinary meaning of the words used in the proclamation, but for the purpose of thereby throwing some light upon the intention of the Executive in issuing the instrument and also to aid in the interpretation of the language employed therein, where the extent or scope of that language is not otherwise entirely plain and clear. A reference to the views that have heretofore been announced by the Executive Department is made in 3 Wharton, *supra*, and it will be found that they are in entire accord with the most liberal spirit for the treatment of non-combatant vessels of the enemy.

Prior Executive views evidence of policy.

We come now to the construction of the instrument. It will be seen that Congress on the 25th of April, 1898, declared war against Spain, and in the declaration it is stated that war had existed since the 21st of April preceding. The President on the 26th of April issued his proclamation regarding the principles to be followed in the prosecution of the war. It is dated the day it was issued. The fourth clause thereof may for convenience be here reproduced, as follows:

Construction to be placed on the President's proclamation.

"4. Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21st, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, upon examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy; or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government."

What is included by the words "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places"? At what time must these Spanish vessels be "in any ports or places within the United States" in order to be exempt

Meaning of certain words of the instrument.

from capture? The time is not stated in the proclamation, and therefore the intention of the Executive as to the time must be inferred. It is a case for construction or interpretation of the language employed.

The language is open to several possible constructions. It might be said that in describing Spanish merchant vessels in any ports, etc., it was meant to include only those which were in such ports on the day when the proclamation was issued, April 26. Or it might be held (in accordance with the decision of the District Court) to include those that were in such ports on the 21st of April, the day that war commenced, as Congress declared. Or it might be construed so as to include not alone those vessels that were in port on that day, but also those that had sailed therefrom on any day up to and including the 21st of May, the last day of exemption, and were, when captured, continuing their voyage, without regard to the particular date of their departure from port, whether immediately before or subsequently to the commencement of the war or the issuing of the proclamation.

The District Judge, before whom several cases were tried together, held that the date of the commencement of the war (April 21) was the date intended by the Executive; that as the proclamation of the 22d of April gave thirty days to neutral vessels found in blockaded ports, it was but reasonable to consider that the same number of days, commencing at the outbreak of the war, should be allowed so as to bring it to the 21st of May, the day named; that although a retrospective effect is not usually given to statutes, yet the question always is, what was the intention of the legislature?

He also said that "the intention of the Executive was to fully recognize the recent practice of civilized nations, and not to sanction or permit the seizure of the vessels of the enemy within the harbors of the United States at the time of the commencement of the war, or to permit them to escape from ports to be seized immediately upon entering upon the high seas." (See preamble to proclamation.)

In the Buena Ventura, the case at bar, the District Judge held that her case "clearly does not come within the language of the proclamation."

It is true the proclamation did not in so many words provide that vessels which had loaded in a port of the United States and sailed therefrom before the commencement of the war should be entitled to continue their voyage,

but we think that those vessels are clearly within the intention of the proclamation under the liberal construction we are bound to give to that document.

Intent of proclamation was to exempt vessels that had sailed before war began.

An intention to include vessels of this class in the exemption from capture seems to us a necessary consequence of the language used in the proclamation when interpreted according to the known views of this Government on the subject and which it is to be presumed were the views of the Executive. The vessel when captured had violated no law, she had sailed from Ship Island after having obtained written permission, in accordance with the laws of the United States, to proceed to Norfolk in Virginia, and the permission had been signed by the deputy collector of the port and the fees therefor paid by the ship. She had a cargo of lumber, loaded but a short time before the commencement of the war, and she left the port but forty eight hours prior to that event. The language of the proclamation certainly does not preclude the exemption of this vessel, and it is not an unnatural or forced construction of the fourth clause to say that it includes this case.

The omission of any date in this clause, upon which the vessel must be in a port of the United States, and prior to which the exemption would not be allowed, is certainly very strong evidence that such a date was not material, so long as the loading and departure from our ports were accomplished before the expiration of May 21. It is also evident from the language used that the material concern was to fix a time in the future, prior to the expiration of which vessels of the character named might sail from our ports and be exempt from capture. The particular time at which the loading of cargoes and sailing from our ports should be accomplished was obviously unimportant, provided it was prior to the time specified. Whether it was before or after the commencement of the war, would be entirely immaterial. This seems to us to be the intention of the Executive, derived from reading the fourth clause with reference to the general rules of interpretation already spoken of, and we think there is no language in the proclamation which precludes the giving effect to such intention. Its purpose was to protect innocent merchantmen of the enemy who had been trading in our ports from capture, provided they sailed from such ports before a certain named time in the future, and that purpose would be

Particular date of sailing unimportant if prior to date set in proclamation.

wholly unaffected by the fact of a sailing prior to the war. That fact was immaterial to the scheme of the proclamation, gathered from all its language.

We do not assert that the clause would apply to a vessel which had left a port of the United States prior to the commencement of the war and had arrived at a foreign port and there discharged her cargo, and had then left for another foreign port prior to May 21. The instructions to United States ships, contained in the fourth clause, to permit the vessels "to continue their voyage" would limit the operation of the clause to those vessels that were still on their original voyage from the United States, and had taken on board their cargo (if any they had) at a port of the United States before the expiration of the term mentioned. The exemption would probably not apply to such a case as *The Phœnix*, (Spink's Prize Cases, 1). That case arose out of the English Order in Council, made at the commencement of the Crimean war. The vessel had sailed from an English port in the middle of February, 1854, with a cargo, bound for Copenhagen, and having reached that port and discharged her cargo by the middle of March, she had sailed therefrom on the 10th of April, bound to a foreign port, and was captured on the 12th of April while proceeding on such voyage. The Order in Council was dated the 29th of March, 1854, and provided that "Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the tenth day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places," etc. The claim of exemption was made on the ground that the vessel had been in an English port, and although she sailed therefrom in the middle of February to Copenhagen and had there discharged her cargo, before the Order in Council was promulgated, yet it was still urged that she was entitled to exemption from capture. The court held the claim was not well founded, and that it could not by any latitude of construction hold a vessel to have been in an English port on the 29th of March, which on that day was lying in the port of Copenhagen, having at that time discharged the cargo which she had taken from the English port. It is true the court took the view that the vessel must at all events have been in an English port on the 29th of March in order to obtain exemption, and if not there on that day, the vessel did not come within the

Exemption applies only to vessels on original voyage from U. S. port.

The Phœnix.

terms of the order and was not exempt from capture. From the language of the opinion in that case it would seem not only that a vessel departing the day before the 29th of March would not come within the exemption, but that a vessel arriving the day after the 29th, and departing before the 10th of May following, would also fail to do so; that the vessel must have been in an English port on the very day named, and if it departed the day before or arrived the day after, it was not covered by the order.

Decrees in Crimean war.

The French Government also, on the outbreak of the Crimean war, decreed a delay of six weeks, beginning on the date of the decree, to Russian merchant vessels in which to leave French ports. Russia issued the same kind of a decree, and other nations have at times made the same provisions. It is claimed that they confine the exemption to vessels that are actually within the ports of the nation at the date of issuing the decree or order.

We are not inclined to put so narrow a construction upon the language used in this proclamation. The interpretation which we have given to it, while it may be more liberal than the other, is still one which may properly be indulged in.

Vessels sailing shortly before and shortly after war began are in same case.

If this vessel, instead of sailing on the 19th, had not sailed until the 21st of April, the court below says she would have been exempt from capture. In truth, she was from her character and her actual employment just as much the subject of liberal treatment, and was as equitably entitled to an exemption when sailing on the 19th, as she would have been had she waited until the 21st. No fact had occurred since her sailing which altered her case in principle from the case of a vessel which had been in port on, though sailing after, the 21st. To attribute an intention on the part of the Executive to exempt a vessel if she sailed on or after the 21st of April, and before the 21st of May, and to refuse such exemption to a vessel in precisely the same situation, only sailing before the 21st, would, as we think, be without reasonable justification. It may safely be affirmed that he never had any such distinction in mind and never intended it to exist. There is nothing in the nature of the two cases calling for a difference in their treatment. They both alike called for precisely the same rule, and if there be language in the clause or proclamation for which an inference can be drawn favorable to the exemption, and none which precludes it,

we are bound to hold that the exemption is given. We think the language of the proclamation does permit the inference and that there is none which precludes it.

Possible step in advance in this construction.

We are aware of no adjudications of our own court as to the meaning to be given to words similar to those contained in the proclamation, and it may be that a step in advance is now taken upon this subject. Where, however, the words are reasonably capable of an interpretation which shall include a vessel of this description in the exemption from capture, we are not averse to adopting it, even though this court may be the first to do so. If the Executive should hereafter be inclined to take the other view, the language of his proclamation could be so altered as to leave no doubt of that intention, and it would be the duty of this court to be guided and controlled by it.

Deciding as we do in regard to the fourth clause, it becomes unnecessary to examine the other grounds for a reversal discussed at the bar.

The Olinde Rodrigues.

The question of costs then arises. We had occasion in *The Olinde Rodrigues*, 174, U. S. 510, to examine that question in relation to the existence of probable cause for making the capture. In that case it was held that such probable cause did exist, and although the facts therein proved did not commend the vessel to the favorable consideration of the court, yet upon a careful review of the entire evidence we held that we were not compelled to proceed to the extremity of condemning the vessel. Restitution was, therefore, awarded, but without damages. Payment of the costs and expenses incident to her custody and preservation, and of all costs in the case except the fees of counsel, were imposed upon the ship.

Probable cause justifies capture.

In this case, but for the proclamation of April 26, the ship would have been liable to seizure and condemnation as enemy's property. At the time of seizure, however, (April 22,) that proclamation had not been issued, and hence there was probable cause for her seizure, although the vessel was herself entirely without fault. The subsequent issuing of the proclamation covering the case of a vessel situated as was this one took away the right to condemn which otherwise would have existed. Thus, at the time of seizure, both parties, the capturing and the captured ship, were without fault, and while we reverse the judgment of condemnation and award restitution, we think

it should be without damages or costs in favor of the vessel captured.

Judgment.

The ship having been sold, the moneys arising from the sale must be paid to the claimant without the deduction of any costs arising in the proceeding, but after deducting the expenses properly incident to her custody and preservation up to the time of her sale, and it is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE GRAY and MR. JUSTICE MCKENNA dissented.

CASES OF THE PAQUETE HABANA AND THE LOLA.

(Vol. 175, United States Reports, p. 677. Decided January 8, 1900. MR. JUSTICE GRAY delivered the opinion of the court.)

The cases are stated in the opinion of the court.

MR. JUSTICE GRAY delivered the opinion of the court.

Statement of the case.

These are two appeals from decrees of the District Court of the United States for the Southern District of Florida, condemning two fishing vessels and their cargoes as prizes of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Cuban birth, living in the city of Havana; was commanded by a subject of Spain, also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron, she had no knowledge of the existence of the war, or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

The Paquete Habana was a sloop, 43 feet long on the keel and of 25 tons burden, and had a crew of three Cubans, including the master, who had a fishing license from the Spanish Government, and no other commission or license. She left Havana March 25, 1898; sailed along the coast of Cuba to Cape San Antonio at the western end of the island, and there fished for twenty-five days, lying between

Statement of the case.

the reefs off the cape, within the territorial waters of Spain; and then started back for Havana, with a cargo of about 40 quintals of live fish. On April 25, 1898, about two miles off Mariel, and eleven miles from Havana, she was captured by the United States gunboat Castine.

The Lola was a schooner, 51 feet long on the keel, and of 35 tons burden, and had a crew of six Cubans, including the master, and no commission or license. She left Havana April 11, 1898, and proceeded to Campeachy Sound off Yucatan, fished there eight days, and started back for Havana with a cargo of about 10,000 pounds of live fish. On April 26, 1898, near Havana, she was stopped by the United States steamship Cincinnati, and was warned not to go into Havana, but was told that she would be allowed to land at Bahia Honda. She then changed her course, and put for Bahia Honda, but on the next morning, when near that port, was captured by the United States steamship Dolphin.

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master, on behalf of himself and the other members of the crew, and of her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, "the court not being satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure."

Each vessel was thereupon sold by auction; the Paquete Habana for the sum of $490; and the Lola for the sum of $800. There was no other evidence in the record of the value of either vessel or of her cargo.

* * * * * * *

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

Growth of the rule exempting coast fishing vessels.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law, notably in 2 Ortolan, Règles Internationales et Diplomatie de la Mer, (4th ed.) lib. 3, c. 2, pp. 51–56; in 4 Calvo, Droit International, (5th ed.) §§ 2367–2373; in De Boeck, Propriété Privée Ennemie sous Pavillon Ennemi, §§ 191–196; and in Hall, International Law, (4th ed.) § 148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.

Earliest acts emanated from England.

The earliest acts of any government on the subject, mentioned in the books, either emanated from, or were approved by, a King of England.

Orders of 1403 and 1406.

In 1403 and 1406, Henry IV issued orders to his admirals and other officers, entitled "Concerning Safety for Fishermen—*De Securitate pro Piscatoribus.*" By an order of October 26, 1403, reciting that it was made pursuant to a treaty between himself and the King of France; and for the greater safety of the fishermen of either country, and so that they could be, and carry on their industry, the more safely on the sea, and deal with each other in peace; and that the French King had consented that English fishermen should be treated likewise; it was ordained that French fishermen might, during the then pending season for the herring fishery, safely fish for herrings and all other fish, from the harbor of Gravelines and the island of Thanet to the mouth of the Seine and the harbor of Hautoune. And by an order of October 5, 1406, he took into his safe conduct, and under his special protection, guardianship and defence, all and singular the fishermen of France, Flanders and Brittany, with their fishing vessels and boats, everywhere on the sea, through and within his dominions, jurisdictions and territories, in regard to their fishery, while sailing, coming and going, and, at their pleasure, freely and lawfully fishing, delaying or proceeding, and returning homeward with their catch of fish, without any molestation or hindrance whatever; and also their fish, nets, and other property and goods soever; and it was therefore ordered that such fishermen should not be interfered with, provided they should comport themselves

well and properly, and should not, by color of these presents, do or attempt, or presume to do or attempt, anything that could prejudice the King, or his Kingdom of England, or his subjects. 8 Rymer's Foedera, 336, 451.

Treaty of 1521 between Charles V and Francis I.

The treaty made October 2, 1521, between the Emperor Charles V and Francis I of France, through their ambassadors, recited that a great and fierce war had arisen between them, because of which there had been, both by land and by sea, frequent depredations and incursions on either side, to the grave detriment and intolerable injury of the innocent subjects of each; and that a suitable time for the herring fishery was at hand, and, by reason of the sea being beset by the enemy, the fishermen did not dare to go out, whereby the subject of their industry, bestowed by heaven to allay the hunger of the poor, would wholly fail for the year, unless it were otherwise provided—*quo fit, ut piscaturæ commoditas, ad pauperum levandam famem a cœlesti numine concessa, cessare hoc anno omnino debeat, nisi aliter provideatur.* And it was therefore agreed that the subjects of each sovereign, fishing in the sea, or exercising the calling of fishermen, could and might, until the end of the next January, without incurring any attack, depredation, molestation, trouble or hindrance soever, safely and freely, everywhere in the sea, take herrings and every other kind of fish, the existing war by land and sea notwithstanding; and further that, during the time aforesaid, no subject of either sovereign should commit, or attempt or presume to commit, any depredation, force, violence, molestation or vexation, to or upon such fishermen, or their vessels, supplies, equipments, nets and fish, or other goods soever truly appertaining to fishing. The treaty was made at Calais, then an English possession. It recites that the ambassadors of the two sovereigns met there at the earnest request of Henry VIII, and with his countenance, and in the presence of Cardinal Wolsey, his chancellor and representative. And towards the end of the said treaty it is agreed that the said King and his said representative, "by whose means the treaty stands concluded, shall be conservators of the agreements therein, as if thereto by both parties elected and chosen." 4 Dumont, Corps Diplomatique, pt. 1, pp. 352, 353.

French and Dutch edicts.

The herring fishery was permitted, in time of war, by French and Dutch edicts in 1536. Bynkershoek, Quæstiones Juris Publicæ, lib. 1, c. 3; 1 Emerigon des Assurances, c. 4, sect. 9; c. 12, sect. 19, § 8.

Example of France from remote times.

France, from remote times, set the example of alleviating the evils of war in favor of all coast fishermen. In the compilation entitled Us et Coutumes de la Mer, published by Cleirac in 1661, and in the third part thereof, containing "Maritime or Admiralty Jurisdiction—*la Jurisdiction de la Marine ou d'Admirauté*—as well in time of peace as in time of war," article 80 is as follows: "The admiral may in time of war accord fishing truces—*tresves pescheresses*—to the enemy and to his subjects; provided that the enemy will likewise accord them to Frenchmen." Cleirac, 544. Under this article, reference is made to articles 49 and 79 respectively of the French ordinances concerning the Admiralty in 1543 and 1584, of which it is but a reproduction. 4 Pardessus, Collection de Lois Maritimes, 319; 2 Ortolan, 51. And Cleirac adds, in a note, this quotation from Froissart's Chronicles: "Fishermen on the sea, whatever war there were in France and England, never did harm to one another; so they are friends, and help one another at need—*Pescheurs sur mer, quelque guerre qui soit en France et Angleterre, jamais ne se firent mal l'un à l'autre; ainçois sont amis, et s'aydent l'un à l'autre au besoin.*"

French practice till end of 17th century.

The same custom would seem to have prevailed in France until towards the end of the seventeenth century. For example, in 1675, Louis XIV and the States General of Holland, by mutual agreement, granted to Dutch and French fishermen the liberty, undisturbed by their vessels of war, of fishing along the coasts of France, Holland and England. D'Hauterive et De Cussy, Traités de Commerce, pt. 1, vol. 2, p. 278. But by the ordinances of 1681 and 1692 the practice was discontinued, because, Valin says, of the faithless conduct of the enemies of France, who, abusing the good faith with which she had always observed the treaties, habitually carried off her fishermen, while their own fished in safety. 2 Valin sur l'Ordonnance de la Marine, (1776) 689, 690; 2 Ortolan, 52; De Boeck § 192.

Discontinuance of early practice in 1681 and 1692.

Doctrine familiar to the United States since the War of Independence.

The doctrine which exempts coast fishermen with their vessels and cargoes from capture as a prize of war has been familiar to the United States from the time of the War of Independence.

French orders in 1779 and 1780.

On June 5, 1779, Louis XVI, our ally in that war, addressed a letter to his admiral, informing him that the wish he had always had of alleviating, as far as he could, the hardships of war, had directed his attention to that

class of his subjects which devoted itself to the trade of fishing, and had no other means of livelihood; that he had thought that the example which he should give to his enemies, and which could have no other source than the sentiments of humanity which inspired him, would determine them to allow to fishermen the same facilities which he should consent to grant; and that he had therefore given orders to the commanders of all his ships not to disturb English fishermen, nor to arrest their vessels laden with fresh fish, even if not caught by those vessels; provided they had no offensive arms, and were not proved to have made any signals creating a suspicion of intelligence with the enemy; and the admiral was directed to communicate the King's intentions to all officers under his control. By a royal order in council of November 6, 1780, the former orders were confirmed; and the capture and ransom, by a French cruiser, of *The John and Sarah*, an English vessel, coming from Holland, laden with fresh fish, were pronounced to be illegal. 2 Code des Prises, (ed. 1784) 721, 901, 903.

Among the standing orders made by Sir James Marriott, Judge of the English High Court of Admiralty, was one of April 11, 1780, by which it was "ordered, that all causes of prize of fishing boats or vessels taken from the enemy may be consolidated in one monition, and one sentence or interlocutory, if under fifty tons burden, and not more than six in number." Marriott's Formulary, 4. But by the statements of his successor, and of both French and English writers, it appears that England, as well as France, during the American Revolutionary War, abstained from interfering with the coast fisheries. *The Young Jacob and Johanna*, 1 C. Rob. 20; 2 Ortolan, 53; Hall, § 148.

Practice during Revolutionary war.

In the treaty of 1785 between the United States and Prussia, article 23, (which was proposed by the American Commissioners, John Adams, Benjamin Franklin and Thomas Jefferson, and is said to have been drawn up by Franklin,) provided that, if war should arise between the contracting parties, "all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen, unarmed and inhabiting unfortified towns, villages or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons;

Rule recognized in treaties of United States and Prussia in 1785, 1799, and 1828.

nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted, by the armed force of the enemy, into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price." 8 Stat. 96; 1 Kent Com. 91 note; Wheaton's History of the Law of Nations, 306, 308. Here was the clearest exemption from hostile molestation or seizure of the persons, occupations, houses and goods of unarmed fishermen inhabiting unfortified places. The article was repeated in the later treaties between the United States and Prussia of 1799 and 1828. 8 Stat. 174, 384. And Dana, in a note to his edition of Wheaton's International Law, says: "In many treaties and decrees, fishermen catching fish as an article of food are added to the class of persons whose occupation is not to be disturbed in war." Wheaton's International Law, (8th ed.) § 345, note 168.

Recognition of rule interrupted during French Revolution.

Since the United States became a nation, the only serious interruptions, so far as we are informed, of the general recognition of the exemption of coast fishing vessels from hostile capture, arose out of the mutual suspicions and recriminations of England and France during the wars of the French Revolution.

In the first years of those wars, England having authorized the capture of French fishermen, a decree of the

1793. French National Convention of October 2, 1793, directed the executive power "to protest against this conduct, theretofore without example; to reclaim the fishing boats seized; and, in case of refusal, to resort to reprisals."

1796. But in July, 1796, the Committee of Public Safety ordered the release of English fishermen seized under the former decree, "not considering them as prisoners of war." *La Nostra Segnora de la Piedad*, (1801) cited below; 2 De Cussy, Droit Maritime, 164, 165; 1 Massé, Droit Commercial, (2d ed.) 266, 267.

1798. On January 24, 1798, the English Government, by express order, instructed the commanders of its ships to seize French and Dutch fishermen with their boats. 6 Martens, Recueil des Traités, (2d ed.) 505; 6 Schoell, Histoire des Traités, 119; 2 Ortolan, 53. After the promulgation of that order, Lord Stowell (then Sir William Scott) in the High Court of Admiralty of England condemned small Dutch fishing vessels as prize of war. In one case, the capture was in April, 1798, and the decree

was made November 13, 1798. *The Young Jacob and Johanna*, 1 C. Rob. 20. In another case, the decree was made August 23, 1799. *The Noydt Gedacht*, 2 C. Rob. 137, note.

Acts of England and France in 1800 and 1801.

For the year 1800 the orders of the English and French governments and the correspondence between them may be found in books already referred to. 6 Martens, 503–512; 6 Schoell, 118–120; 2 Ortolan, 53, 54. The doings for that year may be summed up as follows: On March 27, 1800, the French government, unwilling to resort to reprisals, reënacted the orders given by Louis XVI in 1780, above mentioned, prohibiting any seizure by the French ships of English fishermen, unless armed, or proved to have made signals to the enemy. On May 30, 1800, the English government, having received notice of that action of the French government, revoked its order of January 24, 1798. But, soon afterwards, the English government complained that French fishing boats had been made into fire boats at Flushing, as well as that the French government had impressed, and had sent to Brest, to serve in its flotilla, French fishermen and their boats, even those whom the English had released on condition of their not serving; and on January 21, 1801, summarily revoked its last order, and again put in force its order of January 24, 1798. On February 16, 1801, Napoleon Bonaparte, then First Consul, directed the French commissioner at London to return at once to France, first declaring to the English government that its conduct, "contrary to all the usages of civilized nations, and to the common law which governs them, even in time of war, gave to the existing war a character of rage and bitterness which destroyed even the relations usual in a loyal war," and "tended only to exasperate the two nations, and to put off the term of peace;" and that the French government, having always made it "a maxim to alleviate as much as possible the evils of war, could not think, on its part, of rendering wretched fishermen victims of a prolongation of hostilities, and would abstain from all reprisals."

Freedom of coast fisheries again allowed, 1801.

On March 16, 1801, the Addington ministry, having come into power in England, revoked the orders of its predecessors against the French fishermen; maintaining, however, that "the freedom of fishing was nowise founded upon an agreement, but upon a simple concession;" that "this concession would be always subordinate to the convenience of the moment," and that "it was never extended

to the great fishery, or to commerce in oysters or in fish." And the freedom of the coast fisheries was again allowed on both sides. 6 Martens, 514; 6 Schoell, 121; 2 Ortolan, 54; Manning, Law of Nations, (Amos ed.) 206.

The Young Jacob and Johanna.

Lord Stowell's judgment in *The Young Jacob and Johanna*, 1 C. Rob. 20, above cited, was much relied on by the counsel for the United States, and deserves careful consideration.

The vessel there condemned is described in the report as "a small Dutch fishing vessel taken April, 1798, on her return from the Dogger Bank to Holland;" and Lord Stowell, in delivering judgment, said: "In former wars, it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment, and, as they are brought before me for my judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade." And he added: "It is a further satisfaction to me in giving this judgment to observe that the facts also bear strong marks of a false and fraudulent transaction.

Grounds for the judgment.

Both the capture and condemnation were within a year after the order of the English government of January 24, 1798, instructing the commanders of its ships to seize French and Dutch fishing vessels, and before any revocation of that order. Lord Stowell's judgment shows that his decision was based upon the order of 1798, as well as upon strong evidence of fraud. Nothing more was adjudged in the case.

Examination of expressions used in Lord Stowell's opinion.

But some expressions in his opinion have been given so much weight by English writers, that it may be well to examine them particularly. The opinion begins by admitting the known custom in former wars not to capture such vessels—adding, however, "but this was a rule of comity only, and not of legal decision." Assuming the phrase "legal decision" to have been there used, in the sense in which courts are accustomed to use it, as equivalent to "judicial decision," it is true that, so far as appears, there had been no such decision on the point in England. The word "comity" was apparently used by Lord Stowell as

synonymous with courtesy or good will. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Mackintosh: "In the present century a slow and silent, but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage, and becomes part of the law of nations." Discourse on the Law of Nations, 38; 1 Miscellaneous Works, 360.

Views of French prize tribunals on the general question.

The French prize tribunals, both before and after Lord Stowell's decision, took a wholly different view of the general question. In 1780, as already mentioned, an order in council of Louis XVI had declared illegal the capture by a French cruiser of *The John and Sarah*, an English vessel, coming from Holland, laden with fresh fish. And on May 17, 1801, where a Portuguese fishing vessel, with her cargo of fish, having no more crew than was needed for her management, and for serving the nets, on a trip of several days, had been captured in April, 1801, by a French cruiser, three leagues off the coast of Portugal, the Council of Prizes held that the capture was contrary to "the principles of humanity, and the maxims of international law," and decreed that the vessel, with the fish on board, or the net proceeds of any that had been sold, should be restored to her master. *La Nostra Segnora de la Piedad*, 25 Merlin, Jurisprudence, Prise Maritime, § 3, art. 1, 3; *S. C.* 1 Pistoye et Duverdy, Prises Maritimes, 331; 2 De Cussy, Droit Maritime, 166.

Exemption again established by British orders in council, 1806 and 1810.

The English Government, soon afterwards, more than once unqualifiedly prohibited the molestation of fishing vessels employed in catching and bringing to market fresh fish. On May 23, 1806, it was "ordered in council, that all fishing vessels under Prussian and other colors, and engaged for the purpose of catching fish and conveying them fresh to market, with their crews, cargoes and stores, shall not be molested on their fishing voyages and bringing the same to market; and that no fishing vessels of this description shall hereafter be molested. And the Right Honorable the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty and the Judge of the High Court of Admiralty are to give the necessary directions herein as to them may respectively

appertain." 5 C. Rob. 408. Again, in the order in council of May 2, 1810, which directed that "all vessels which shall have cleared out from any port so far under the control of France or her allies as that British vessels may not freely trade thereat, and which are employed in the whale fishery, or other fishery of any description, save as hereinafter excepted, and are returning or destined to return either to the port from whence they cleared, or to any other port or place at which the British flag may not freely trade, shall be captured, and condemned together with their stores and cargoes, as prize to the captors," there were excepted "vessels employed in catching and conveying fish fresh to market, such vessels not being fitted or provided for the curing of fish." Edw. Adm. appx. L.

Wheaton's view in 1815.

Wheaton, in his Digest of the Law of Maritime Captures and Prizes, published in 1815, wrote: "It has been usual in maritime wars to exempt from capture fishing boats and their cargoes, both from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. This custom, so honorable to the humanity of civilized nations, has fallen into disuse; and it is remarkable that France and England mutually reproach each other with that breach of good faith which has finally abolished it." Wheaton on Captures, C. 2, § 18.

This statement clearly exhibits Wheaton's opinion that the custom had been a general one, as well as that it ought to remain so. His assumption that it had been abolished by the differences between France and England at the close of the last century was hardly justified by the state of things when he wrote, and has not since been borne out.

Exemption in the wars of the French Empire and in the Mexican war.

During the wars of the French Empire, as both French and English writers agree, the coast fisheries were left in peace. 2 Ortolan, 54; De Boeck, § 193; Hall, § 148. De Boeck quaintly and truly adds, "and the incidents of 1800 and of 1801 had no morrow—*n'eurent pas de lendemain*."

In the war with Mexico in 1846, the United States recognized the exemption of coast fishing boats from capture. In proof of this, counsel have referred to records of the Navy Department, which this court is clearly authorized to consult upon such a question. *Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250, 253.

By those records it appears that Commodore Conner,

commanding the Home Squadron blockading the east coast of Mexico, on May 14, 1846, wrote a letter from the ship Cumberland, off Brazos Santiago, near the southern point of Texas, to Mr. Bancroft, the Secretary of the Navy, enclosing a copy of the commodore's "instructions to the commanders of the vessels of the Home Squadron, showing the principles to be observed in the blockade of the Mexican ports," one of which was that "Mexican boats engaged in fishing on any part of the coast will be allowed to pursue their labors unmolested;" and that on June 10, 1846, those instructions were approved by the Navy Department, of which Mr. Bancroft was still the head, and continued to be until he was appointed minister to England in September following. Although Commodore Conner's instructions and the Department's approval thereof do not appear in any contemporary publication of the Government, they evidently became generally known at the time, or soon after; for it is stated in several treatises on international law (beginning with Ortolan's second edition, published in 1853) that the United States in the Mexican War permitted the coast fishermen of the enemy to continue the free exercise of their industry. 2 Ortolan, (2d ed.) 49 note; (4th ed.) 55; 4 Calvo, (5th ed.) § 2372; De Boeck, § 194; Hall, (4th ed.) sec. 148.

Commodore Stockton's proclamation apparently not favoring exemption.

As qualifying the effect of those statements, the counsel for the United States relied on a proclamation of Commodore Stockton, commanding the Pacific Squadron, dated August 20, 1846, directing officers under his command to proceed immediately to blockade the ports of Mazatlan and San Blas on the west coast of Mexico, and saying to them, "All neutral vessels that you may find there you will allow twenty days to depart; and you will make the blockade absolute against all vessels, except armed vessels of neutral nations. You will capture all vessels under the Mexican flag that you may be able to take." Navy Report of 1846, pp. 673, 674. But there is nothing to show that Commodore Stockton intended, or that the Government approved, the capture of coast fishing vessels.

Halleck was Stockton's adviser.

On the contrary, General Halleck, in the preface to his work on International Law or Rules Regulating the Intercourse of States in Peace and War, published in 1861, says that he began that work, during the war between the United States and Mexico, "while serving on the staff of the commander of the Pacific Squadron" and "often required to give opinions on questions of international

law growing out of the operations of the war." Had the practice of the blockading squadron on the west coast of Mexico during that war, in regard to fishing vessels, differed from that approved by the Navy Department on the east coast, General Halleck could hardly have failed to mention it, when stating the prevailing doctrine upon the subject as follows:

Halleck's International Law on the subject.

"Fishing boats have also, as a general rule, been exempted from the effects of hostilities. As early as 1521, while war was raging between Charles V and Francis, ambassadors from these two sovereigns met at Calais, then English, and agreed that, whereas the herring fishery was about to commence, the subjects of both belligerents, engaged in this pursuit, should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800, the British and French governments issued formal instructions exempting the fishing boats of each other's subjects from seizure. This order was subsequently rescinded by the British government, on the alleged ground that some French fishing boats were equipped as gunboats, and that some French fishermen, who had been prisoners in England, had violated their parole not to serve, and had gone to join the French fleet at Brest. Such excuses were evidently mere pretexts, and, after some angry discussions had taken place on the subject, the British restriction was withdrawn, and the freedom of fishing was again allowed on both sides. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers." Halleck, (1st ed.) c. 20, § 23.

That edition was the only one sent out under the author's own auspices, except an abridgment, entitled Elements of International Law and the Law of War, which he published in 1866, as he said in the preface, to supply a suitable text-book for instruction upon the subject, "not only in our colleges, but also in our two great national schools—the Military and Naval Academies." In that abridgment, the statement as to fishing boats was condensed, as follows: "Fishing boats have also, as a general rule, been exempted from the effects of hostilities. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French

courts, which have restored such vessels when captured by French cruisers." Halleck's Elements, c. 20, § 21.

Treaty of 1848.

In the treaty of peace between the United States and Mexico in 1848 were inserted the very words of the earlier treaties with Prussia, already quoted, forbidding the hostile molestation or seizure in time of war of the persons, occupations, houses or goods of fishermen. 9 Stat. 939, 940.

Wharton's Digest.

Wharton's Digest of the International Law of the United States, published by authority of Congress in 1886 and 1887, embodies General Halleck's fuller statement, above quoted, and contains nothing else upon the subject. 3 Whart. Int. Law Dig. § 345, p. 315; 2 Halleck, (Eng. eds. 1873 and 1878) p. 151.

Action of France, 1854, 1859, and 1870.

France, in the Crimean War in 1854, and in her wars with Austria in 1859 and with Germany in 1870, by general orders, forbade her cruisers to trouble the coast fisheries, or to seize any vessel or boat engaged therein, unless naval or military operations should make it necessary. Calvo, § 2372; Hall, § 148; 2 Ortolan, (4th ed.) 449; 10 Revue de Droit International, (1878) 399.

England's action in the Crimean War.

Calvo says that in the Crimean War, "notwithstanding her alliance with France and Italy, England did not follow the same line of conduct, and her cruisers in the Sea of Azof destroyed the fisheries, nets, fishing implements, provisions, boats, and even the cabins, of the inhabitants of the coast." Calvo, § 2372. And a Russian writer on Prize Law remarks that those depredations, "having brought ruin on poor fishermen and inoffensive traders, could not but leave a painful impression on the minds of the population, without impairing in the least the resources of the Russian Government." Katchenovsky, (Pratt's ed.) 148. But the contemporaneous reports of the English naval officers put a different face on the matter, by stating that the destruction in question was part of a military measure, conducted with the coöperation of the French ships, and pursuant to instructions of the English admiral "to clear the seaboard of all fish stores, all fisheries and mills, on a scale beyond the wants of the neighboring population, and indeed of all things destined to contribute to the maintenance of the enemy's army in the Crimea;" and that the property destroyed consisted of large fishing establishments and storehouses of the Russian Government, numbers of heavy launches, and enormous quantities of nets and gear, salted fish, corn and other provisions,

intended for the supply of the Russian army. United Service Journal of 1855, pt. 3, pp. 108–112.

No denial of exemption since 1806.

Since the English orders in council of 1806 and 1810, before quoted, in favor of fishing vessels employed in catching and bringing to market fresh fish, no instance has been found in which the exemption from capture of private coast fishing vessels, honestly pursuing their peaceful industry, has been denied by England or by any other nation. And the Empire of Japan, (the last State admitted into the rank of civilized nations,) by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts, and ordained that "the following enemy's vessels are exempt from detention"—including in the exemption "boats engaged in coast fisheries," as well as "ships engaged exclusively on a voyage of scientific discovery, philanthropy or religious mission." Takahashi, International Law, 11, 178.

Japan's action in 1894.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence to these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton* v. *Guyot*, 159 U. S. 113, 163, 164, 214, 215.

International law is part of United States law; how ascertained and administered.

Wheaton places, among the principal sources of international law, "Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules

Wheaton.

laid down in their works being impugned by the avowal of contrary principles." Wheaton's International Law, (8th ed.) § 15.

Kent. Chancellor Kent says: "In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law." 1 Kent Com. 18.

It will be convenient, in the first place, to refer to some leading French treatises on international law, which deal with the question now before us, not as one of the law of France only, but as one determined by the general consent of civilized nations.

Pistoye and Duverdy. "Enemy ships," say Pistoye and Duverdy, in their Treatise on Maritime Prizes, published in 1855, "are good prize. Not all, however; for it results from the unanimous accord of the maritime powers that an exception should be made in favor of coast fishermen. Such fishermen are respected by the enemy, so long as they devote themselves exclusively to fishing." 1 Pistoye et Duverdy, tit. 6, c. 1, p. 314.

De Cussy. De Cussy, in his work on the Phases and Leading Cases of the Maritime Law of Nations—*Phases et Causes Célèbres du Droit Maritime des Nations*—published in 1856, affirms in the clearest language the exemption from capture of fishing boats, saying, in lib. 1, tit. 3, § 36, that "in time of war the freedom of fishing is respected by belligerents; fishing boats are considered as neutral; in law, as in principle, they are not subject either to capture or to confiscation;" and that in lib. 2, c. 20, he will state "several facts and several decisions which prove that the perfect freedom and neutrality of fishing boats are not illusory." 1 De Cussy, p. 291. And in the chapter referred to, entitled *De la Liberté et de la Neutralité Parfaite de la Pêche*, besides references to the edicts and decisions in France during the French Revolution, is this general statement: "If one consulted only positive international law"—*le droit des gens positif*—(by which is evidently meant international law expressed in treaties,

decrees or other public acts, as distinguished from what may be implied from custom or usage,) "fishing boats would be subject, like all other trading vessels, to the law of prize; a sort of tacit agreement among all European nations frees them from it, and several official declarations have confirmed this privilege in favor of 'a class of men whose hard and ill rewarded labor, commonly performed by feeble and aged hands, is so foreign to the operations of war.'" 2 De Cussy, 164, 165.

Ortolan.

Ortolan, in the fourth edition of his *Règles Internationales et Diplomatie de la Mer*, published in 1864, after stating the general rule that the vessels and cargoes of subjects of the enemy are lawful prize, says: "Nevertheless, custom admits an exception in favor of boats engaged in the coast fishery; these boats, as well as their crews, are free from capture and exempt from all hostilities. The coast fishing industry is, in truth, wholly pacific, and of much less importance, in regard to the national wealth that it may produce, than maritime commerce or the great fisheries. Peaceful and wholly inoffensive, those who carry it on, among whom women are often seen, may be called the harvesters of the territorial seas, since they confine themselves to gathering in the products thereof; they are for the most part poor families who seek in this calling hardly more than the means of gaining their livelihood." 2 Ortolan, 51. Again, after observing that there are very few solemn public treaties which make mention of the immunity of fishing boats in time of war, he says: "From another point of view, the custom which sanctions this immunity is not so general that it can be considered as making an absolute international rule; but it has been so often put in practice, and, besides, it accords so well with the rule in use, in wars on land, in regard to peasants and husbandmen, to whom coast fishermen may be likened, that it will doubtless continue to be followed in maritime wars to come." 2 Ortolan, 55.

Calvo.

No international jurist of the present day has a wider or more deserved reputation than Calvo, who, though writing in French, is a citizen of the Argentine Republic, employed in its diplomatic service abroad. In the fifth edition of his great work on international law, published in 1896, he observes, in § 2366, that the international authority of decisions in particular cases by the prize courts of France, of England, and of the United States, is lessened by the fact that the principles on which they are based are largely

derived from the internal legislation of each country; and yet the peculiar character of maritime wars, with other considerations, gives to prize jurisprudence a force and importance reaching beyond the limits of the country in which it has prevailed. He therefore proposes here to group together a number of particular cases proper to serve as precedents for the solution of grave questions of maritime law in regard to the capture of private property as prize of war. Immediately, in § 2367, he goes on to say: "Notwithstanding the hardships to which maritime wars subject private property, notwithstanding the extent of the recognized rights of belligerents, there are generally exempted, from seizure and capture, fishing vessels." In the next section he adds: "This exception is perfectly justiciable—*Cette exception est parfaitement justiciable*"—that is to say, belonging to judicial jurisdiction or cognizance. Littré, Dict. *voc.* Justiciable; *Hans* v. *Louisiana*, 134 U. S. 1, 15. Calvo then quotes Ortolan's description, above cited, of the nature of the coast fishing industry; and proceeds to refer, in detail, to some of the French precedents, to the acts of the French and English governments in the times of Louis XVI and of the French Revolution, to the position of the United States in the war with Mexico, and of France in later wars, and to the action of British cruisers in the Crimean war. And he concludes his discussion of the subject, in § 2373, by affirming the exemption of the coast fishery, and pointing out the distinction in this regard between the coast fishery and what he calls the great fishery, for cod, whales or seals, as follows: "The privilege of exemption from capture, which is generally acquired by fishing vessels plying their industry near the coasts, is not extended in any country to ships employed on the high sea in what is called the great fishery, such as that for the cod, for the whale or the sperm whale, or for the seal or sea calf. These ships are, in effect, considered as devoted to operations which are at once commercial and industrial—*Ces navires sont en effet considérés comme adonnés à des opérations à la fois commerciales et industrielles.*" The distinction is generally recognized. 2 Ortolan, 54; De Boeck, § 196; Hall, § 148. See also *The Susa*, 2 C. Rob. 251; *The Johan*, Edw. Adm. 275, and appx. L.

The modern German books on international law, cited by the counsel for the appellants, treat the custom, by which the vessels and implements of coast fishermen are

exempt from seizure and capture, as well established by the practice of nations. Heffter, § 137; 2 Kaltenborn, § 237, p. 480; Bluntschli, § 667; Perel, § 37, p. 217.

De Boeck.

De Boeck, in his work on Enemy Private Property under Enemy Flag—*de la Propriété Privée Ennemie sous Pavillon Ennemi*—published in 1882, and the only continental treatise cited by the counsel for the United States, says in § 191: "A usage very ancient, if not universal, withdraws from the right of capture enemy vessels engaged in the coast fishery. The reason of this exception is evident; it would have been too hard to snatch from poor fishermen the means of earning their bread." "The exemption includes the boats, the fishing implements and the cargo of fish." Again, in § 195: "It is to be observed that very few treaties sanction in due form this immunity of the coast fishery." "There is, then, only a custom. But what is its character? Is it so fixed and general that it can be raised to the rank of a positive and formal rule of international law?" After discussing the statements of other writers, he approves the opinion of Ortolan (as expressed in the last sentence above quoted from his work) and says that, at bottom, it differs by a shade only from that formulated by Calvo and by some of the German jurists, and that "it is more exact, without ignoring the imperative character of the humane rule in question—*elle est plus exacte, sans méconnaître le caractère impératif de la règle d'humanité dont il s'agit.*" And in § 196, he defines the limits of the rule as follows: "But the immunity of the coast fishery must be limited by the reasons that justify it. The reasons of humanity and of harmlessness—*les raisons d'humanité et d'innocuité*—which militate in its favor do not exist in the great fishery, such as the cod fishery; ships engaged in that fishery devote themselves to truly commercial operations, which employ a large number of seamen. And these same reasons cease to be applicable to fishing vessels employed for a warlike purpose, to those which conceal arms, or which exchange signals of intelligence with ships of war; but only those taken in the fact can be rigorously treated; to allow seizure by way of prevention would open the door to every abuse, and would be equivalent to a suppression of the immunity."

Two recent English text-writers, cited at the bar, (influenced by what Lord Stowell said a century since,) hesitate to recognize that the exemption of coast fishing vessels

from capture has now become a settled rule of international law. Yet they both admit there is little real difference in the views, or in the practice, of England and of other maritime nations; and that no civilized nation at the present day would molest coast fishing vessels, so long as they were peaceably pursuing their calling, and there was no danger that they or their crews might be of military use to the enemy. Hall, in § 148 of the fourth edition of his Treatise on International Law, after briefly sketching the history of the positions occupied by France and England at different periods, and by the United States in the Mexican War, goes on to say: "In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any State has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption." So T. J. Lawrence, in § 206 of his Principles of International Law, says: "The difference between the English and the French view is more apparent than real; for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own State; and no jurist would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France when Great Britain gave the order to capture them in 1800."

Hall.

Lawrence.

But there are writers of various maritime countries, not yet cited, too important to be passed by without notice.

Jan Helenus Ferguson, Netherlands Minister to China, and previously in the naval and in the colonial service of his country, in his Manual of International Law for the Use of Navies, Colonies and Consulates, published in 1882, writes: "An exception to the usage of capturing enemy's private vessels at sea is the coast fishery." "This principle of immunity from capture of fishing boats is generally adopted by all maritime powers, and in actual warfare they are universally spared so long as they remain harmless." 2 Ferguson, § 212.

Ferguson.

Attlmayr

Ferdinand Attlmayr, Captain in the Austrian Navy, in his Manual for Naval Officers, published at Vienna in 1872 under the auspices of Admiral Tegetthoff, says: "Regarding the capture of enemy property, an exception must be mentioned, which is a universal custom. Fishing vessels which belong to the adjacent coast, and whose business yields only a necessary livelihood, are, from considerations of humanity, universally excluded from capture." 1 Attlmayr, 61.

de Negrin.

Ignacio de Negrin, First Official of the Spanish Board of Admiralty, in his Elementary Treatise on Maritime International Law, adopted by royal order as a text-book in the Naval Schools of Spain, and published at Madrid in 1873, concludes his chapter "Of the lawfulness of prizes" with these words: "It remains to be added that the custom of all civilized people excludes from capture, and from all kind of hostility, the fishing vessels of the enemy's coasts, considering this industry as absolutely inoffensive, and deserving, from its hardships and usefulness, of this favorable exception. It has been thus expressed in very many international conventions, so that it can be deemed an incontestable principle of law, at least among enlightened nations." Negrin, tit. 3, c. 1, § 310.

Testa.

Carlos Testa, Captain in the Portuguese Navy and Professor in the Naval School at Lisbon, in his work on Public International Law, published in French at Paris in 1886, when discussing the general right of capturing enemy ships, says: "Nevertheless, in this, customary law establishes an exception of immunity in favor of coast fishing vessels. Fishing is so peaceful an industry, and is generally carried on by so poor and so hardworking a class of men, that it is likened, in the territorial waters of the enemy's country, to the class of husbandmen who gather the fruits of the earth for their livelihood. The examples and practice generally followed establish this humane and beneficent exception as an international rule, and this rule may be considered as adopted by customary law and by all civilized nations." Testa, pt. 3, c. 2, in 18 Bibliothèque International et Diplomatique, pp. 152, 153.

Fiore.

No less clearly and decisively speaks the distinguished Italian jurist, Pasquale Fiore, in the enlarged edition of his exhaustive work on Public International Law, published at Paris in 1885–6, saying: "The vessels of fishermen have been generally declared exempt from confiscation, because of the eminently peaceful object of their

humble industry, and of the principles of equity and humanity. The exemption includes the vessel, the implements of fishing, and the cargo resulting from the fishery. This usage, eminently humane, goes back to very ancient times; and although the immunity of fishery along the coasts may not have been sanctioned by treaties, yet it is considered to-day as so definitely established, that the inviolability of vessels devoted to that fishery is proclaimed by the publicists as a positive rule of international law, and is generally respected by the nations. Consequently we shall lay down the following rule: (*a*) Vessels belonging to the citizens of the enemy State, and devoted to fishing along the coasts, cannot be subject to capture. (*b*) Such vessels, however, will lose all right of exemption, when employed for a warlike purpose. (*c*) There may, nevertheless, be subjected to capture vessels devoted to the great fishery in the ocean, such as those employed in the whale fishery, or in that for seals or sea calves." 3 Fiore, § 1421.

Exemption of coast fishing vessels now an established rule.

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

Rule voided by warlike employment; does not apply to great fisheries.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give away.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty

or other public act of their own government in relation to the matter.

Calvo, in a passage already quoted, distinctly affirms that the exemption of coast fishing vessels from capture is perfectly justiciable, or, in other words, of judicial jurisdiction or cognizance. Calvo, § 2368. Nor are judicial precedents wanting in support of the view that this exemption, or a somewhat analogous one, should be recognized and declared by a prize court.

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Attitude of the United States in Spanish war.

The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.

On April 21, 1898, the Secretary of the Navy gave instructions to Admiral Sampson, commanding the North Atlantic Squadron, to "immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west." Bureau of Navigation Report of 1898, appx. 175. The blockade was immediately instituted accordingly. On April 22, the President issued a proclamation, declaring that the United States had instituted and would maintain that blockade, "in pursuance of the laws of the United States, and the law of nations applicable to such cases." 30 Stat. 1769. And by the act of Congress of April 25, 1898, c. 189, it was declared that the war between the United States and Spain existed on that day, and had existed since and including April 21. 30 Stat. 364.

On April 26, 1898, the President issued another proclamation, which, after reciting the existence of the war, as declared by Congress, contained this further recital: "It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice." This recital was followed by specific declarations of certain rules for the conduct of the war by sea, making no mention of fishing vessels. 30 Stat. 1770. But the proclamation clearly manifests the general policy of the Government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations.

Sampson's dispatch concerning Cuban fishermen; grounds for holding them.

On April 28, 1898, (after the capture of the two fishing vessels now in question,) Admiral Sampson telegraphed to the Secretary of the Navy as follows: "I find that a

large number of fishing schooners are attempting to get into Havana from their fishing grounds near the Florida reefs and coasts. They are generally manned by excellent seamen, belonging to the maritime inscription of Spain, who have already served in the Spanish navy, and who are liable to further service. As these trained men are naval reserves, have a semi-military character, and would be most valuable to the Spaniards as artillerymen, either afloat or ashore, I recommend that they should be detained as prisoners of war, and that I should be authorized to deliver them to the commanding officer of the army at Key West." To that communication the Secretary of the Navy, on April 30, 1898, guardedly answered: "Spanish fishing vessels attempting to violate blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained." Bureau of Navigation Report of 1898, appx. 178. The Admiral's dispatch assumed that he was not authorized, without express order, to arrest coast fishermen peaceably pursuing their calling; and the necessary implication and evident intent of the response of the Navy Department were that Spanish coast fishing vessels and their crews should not be interfered with, so long as they neither attempted to violate the blockade, nor were considered likely to aid the enemy.

Answer of the Secretary.

The Paquete Habana, as the record shows, was a fishing sloop of 25 tons burden, sailing under the Spanish flag, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba. Her crew consisted of but three men, including the master; and, according to a common usage in coast fisheries, had no interest in the vessel, but were entitled to two thirds of her catch, the other third belonging to her Spanish owner, who, as well as the crew, resided in Havana. On her last voyage, she sailed from Havana along the coast of Cuba, about two hundred miles, and fished for twenty-five days off the cape at the west end of the island, within the territorial waters of Spain; and was going back to Havana, with her cargo of live fish, when she was captured by one of the blockading squadron, on April 25, 1898. She had no arms or ammunition on board; she had no knowledge of the blockade, or even of the war, until she was stopped by a blockading vessel; she made no attempt to run the blockade, and no resistance at the time of the capture; nor was there any evidence whatever of likelihood that she or her crew would aid the enemy.

Résumé.

In the case of the Lola, the only differences in the facts were that she was a schooner of 35 tons burden, and had a crew of six men, including the master; that after leaving Havana, and proceeding some two hundred miles along the coast of Cuba, she went on, about a hundred miles farther, to the coast of Yucatan, and there fished for eight days; and that, on her return, when near Bahia Honda, on the coast of Cuba, she was captured, with her cargo of live fish, on April 27, 1898. These differences afford no ground for distinguishing the two cases.

Each vessel was of a moderate size, such as is not unusual in coast fishing smacks, and was regularly engaged in fishing on the coast of Cuba. The crew of each were few in number, had no interest in the vessel, and received, in return for their toil and enterprise, two thirds of her catch, the other third going to her owner by way of compensation for her use. Each vessel went out from Havana to her fishing ground, and was captured when returning along the coast of Cuba. The cargo of each consisted of fresh fish, caught by her crew from the sea, and kept alive on board. Although one of the vessels extended her fishing trip across the Yucatan Channel and fished on the coast of Yucatan, we can not doubt that each was engaged in the coast fishery, and not in a commercial adventure, within the rule of international law.

The two vessels and their cargoes were condemned by the District Court as prize of war; the vessels were sold under its decrees; and it does not appear what became of the fresh fish of which their cargoes consisted.

Judgment.

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause; and it is therefore, in each case,

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice McKenna, dissenting.

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Case of the Adula.

(Vol. 176, United States Reports, p. 361. Decided February 26, 1909.)

Statement of the case.

This was a libel in prize against the British steamship Adula, then under charter to a Spanish subject, which was seized June 29, 1898, by the United States cruiser Marblehead, for attempting to run the blockade established at Guantanamo Bay in the island of Cuba, and was subsequently sent into the port of Savannah for adjudication.

The Adula, a vessel of 372 tons, was built at Belfast in 1889, for her owner, the Atlas Steamship Company, Limited, a British corporation, and was registered in the name of its managing director, Sir William Bowers Forwood. Prior to the American-Spanish war she was engaged in general trade between Kingston and other ports on the coast of Jamaica, and from time to time had made voyages to Cuban ports. After the breaking out of the war the steamer was chartered by various persons in the intervals of its regular work, for voyages to Cuba.

In the meantime, however, under the command of Rear Admiral Sampson, a blockade was established at Santiago, where the Spanish fleet lay under the command of Admiral Cervera. Upon June 8, a blockade of Guantanamo Bay was also established by order of Admiral Sampson, the blockading squadron being under the command of Commander McCalla. Both of these blockades were maintained during the war. On April 22, a blockade of the north coast of Cuba between Cardenas and Bahia Honda and of Cienfuegos on the south coast was declared by the President. On June 27, the President by proclamation gave notice that the Cuban blockade had been extended to include all the ports on the southern coast between Cape Francis and Cape Cruz. This included the port of Manzanillo. On the 28th, this proclamation was made known to the vessels off Guantanamo.

On June 27, the Adula, then at Kingston, was engaged in taking on a cargo for shipment. On the 28th she discharged this cargo, and the agent of the Atlas Company entered into a charter party with one Solis, a Spanish subject formerly resident in Manzanillo, of the material parts of which the following is a copy:

The Adula was put at the disposal of the charterer "for the conveyance of passengers from Cuban ports hereinafter to be named, to Kingston. The ports that the vessel is to go to are Manzanillo, Santiago and Guantanamo; but

Statement of the case.

it is distinctly understood and agreed by the parties aforesaid that it shall not be deemed a breach of this agreement should the steamer be prevented from entering any of those ports from causes beyond the control of the company, but that should she be able to enter one or all of them, she shall embark the passengers that the charterer shall engage for her and proceed on her voyage. If she is not permitted to enter either Manzanillo, Santiago or Guantanamo, the vessel is to return to Kingston, and the voyage shall be considered completed, and the charter money hereinafter referred to earned without any deductions. . . . The charterer is to provide a good and efficient government pilot to conduct the ship safely into the ports which have been named. Should she be permitted to enter them the charterer guarantees that the proper and efficient clearances shall be obtained for each port, so that the ship shall not be subjected to any fines for breach of regulations. . . . The company will give the option to the charterer for another voyage similar to this on similar terms, providing the charterer gives the company twenty-four hours' notice after the arrival of the steamer at Kingston.

Accompanying this charter were certain instructions, printed in the margin,[1] from the agent of the company to

[1] Atlas Steamship Company,
Jamaica Agency, *June* 28, 1898.

Captain Yeates, S. S. Adula.

Dear Sir: I inclose herein a copy of the agreement under which your vessel is proceeding on, and on board the ship will be the charterer, to whom I now introduce you, Mr. José R. Solis, and I ask you to show him every attention on the voyage.

You will see by a perusal of the agreement that you are on a voyage wholly and solely for the conveyance of refugees from the ports named to Kingston.

On your arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American warships off the port. You will, when signalled to, stop immediately and communicate to the commanding officer the voyage that you are on, and, in fact, you can show him these sailing orders, and I do not think that the commanding officer will make any trouble whatever to your continuing the voyage into the port.

You must be careful on your arrival there not to interfere or in any way make any observation or sketches of anything that you may see or hear of, but adhere strictly to the duties of your ship.

At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible that he may be able to tell you where you can obtain the services of a pilot to go in.

From Guantanamo you will proceed to off Santiago. Here you will

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Captain Yeates, the commander of the Adula. These were taken from the ship when she was captured. The Adula left Kingston late in the afternoon of June 28. Before sailing, Solis asked from the United States consul at Kingston a permit to enter the ports of Guantanamo, Santiago and Manzanillo. This the consul refused to give without special instructions from Washington. Just before sailing to Santiago, Solis cabled for a licensed pilot to meet the Adula. On leaving Kingston she took her course around Morant Point at the easterly end of the island, first toward Santiago, and then to Guantanamo, and about 4 P. M. of the following day was met before reaching the harbor and brought to by the steamship Vixen; was directed to proceed, entered the harbor of Guantanamo, and was seized by the Marblehead, which, with other vessels of the fleet, was lying inside the bay, and was sent to Savannah, where a libel in prize was filed against her on July 21, 1898. The depositions *in preparatorio* were taken July 21, and her owner, the Atlas Steamship Company, appeared as claimant and filed its answer. The case was heard upon the proofs *in preparatorio*, and a decree of condemnation entered July 28. (89 Fed. Rep. 351.) Before the decree, claimant moved for leave to take further proofs. The court set the motion down for August 9, giving claimant leave to serve such affidavits and other papers as it might desire to read upon

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meet the other fleet, and carry the same instructions out with them as I have mentioned to you in reference to Guantanamo. The charterer is telegraphing at once to Santiago for a pilot to come off to meet the ship, if permission is granted, to pilot your ship into the port.

From Santiago you will proceed to Manzanillo, and from thence back to Kingston. The charterer, Mr. Solis, may order you direct from Guantanamo to Kingston or from Santiago to Kingston, and in such a case you will follow out his orders, which he will give you in writing. He has the option of going to the three ports, but it may be convenient for him to go to only one or even two. The boat's crew that is mentioned in the appendix of this agreement you will provide, but it will be necessary for you to have the ensign in the stern, so as to show your nationality.

You will not allow any provisions of any sort to leave your ship at any of the ports or to do anything that is contrary to the laws of the country or that may be interpreted as a breach of faith in being allowed to pass the blockade and enter the ports, and I must ask you not to permit any of your crew to land at any of the ports, and only yourself, if necessary, to visit the British consul.

Wishing you a pleasant voyage, I am, sir,

Yours faithfully,

(S'g'd) W. Peploe Forwood, *Gen. Ag't, Jca.*

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the motion, and directed the entry of the decree to be without prejudice to such motion. The motion was finally denied, and the vessel released upon a stipulation for her value.

From the decree of condemnation her owner and claimant appealed to this court.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Opinion.

The rectitude of the decree by the District Court condemning the Adula as prize of war depends upon the existence of a lawful and effective blockade at Guantanamo, the knowledge of such blockade by those in charge of the vessel, and their intent in making the voyage from Kingston.

1. No blockade of Guantanamo was ever proclaimed by the President. A proclamation had been issued June 27, establishing a blockade of all ports on the southern coast of Cuba between Cape Frances on the west and Cape Cruz on the east, but as both Guantanamo and Santiago are to the eastward of Cape Cruz, they were not included. It appears, however, that blockades of Santiago and Guantanamo were established in the early part of June by order of Admiral Sampson, commander of the naval forces then investing the ports on the southern coast of Cuba, and were maintained as actual and effective blockades until after the capture of the Adula.

Actual as distinguished from public blockade.

The legality of a simple or actual blockade as distinguished from a public or Presidential blockade is noticed by writers upon international law, and is said by Halleck to be "constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence." (Halleck Int. L., chap. 23, sec. 10.) A *de facto* blockade was also recognized as legal by this court in the case of *The Circassian*, 2 Wall. 135, 150, in which the question arose as to the blockade of New Orleans during the civil war. In delivering the opinion of the court, the Chief Justice observed: "There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to

Naval officers may establish actual blockades.

other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation."

Sir William Scott on right of naval officers to impose actual blockades.

A like ruling was made by Sir William Scott in the case of *The Rolla*, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of *The Henrick and Maria*, 1 C. Rob. 123, that the power of imposing a blockade is altogether an act of sovereignty which cannot be assumed or exercised by a commander without special authority. But says the learned judge: "The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service upon which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant ports of the world it can not be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the immediate purpose of reduction. See also *The Johanna Maria*, Deane on Blockades, 86.

Blockade of Guantanamo competently established.

In view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, we think it was competent for Admiral Sampson to establish a blockade there and at Guantanamo as an adjunct to such operations. Indeed, it would seem to have been a necessity that restrictions should be placed upon the power of neutrals to carry supplies and intelligence to the enemy, as they would be quite sure to do, if their ships were given free ingress and egress from these harbors. While there could be no objections to vessels carrying provisions to the starving insurgents, if their destination could be made certain, the probabilities were that such provisions carried to a beleaguered port, would be immediately seized by the enemy and used for the sustenance of its soldiers. The exigency was one which ren-

dered it entirely prudent for the commander of the fleet to act, without awaiting instructions from Washington.

Contention that blockade was ended by possession.

But it is contended that at the time of the capture, the port of Guantanamo was completely in the possession and control of the United States, and therefore that the blockade had been terminated. It appears, however, that Guantanamo is eighteen miles from the mouth of Guantanamo Bay. Access to it is obtained either by a small river emptying into the upper bay, or by rail from Caimanera, a town on the west side of the upper bay. It seems that the Marblehead and the Yankee were sent to Guantanamo on June 7; entered the harbor and took possession of the lower bay for the use of American vessels; that the Panther and Yosemite were sent there on the 10th, and on the 12th the torpedo boat Porter arrived from Guantanamo with news of a land battle, and from that time the harbor was occupied by naval vessels, and by a party of marines who held the crest of a hill on the west side of the harbor near its entrance, and the side of the hill facing the harbor. But the town of Guantanamo, near the head of the bay, was still held by the Spanish forces, as were several other positions in the neighborhood. The campaign in the vicinity was in active progress, and encounters between the United States and Spanish troops were of frequent occurrence.

Town beyond mouth of bay was held by enemy and blockade was operative.

In view of these facts we are of opinion that, as the city of Guantanamo was still held by the Spaniards, and as our troops occupied only the mouth of the bay, the blockade was still operative as against vessels bound for the city of Guantanamo. Here again the case of *The Circassian*, 2 *The Circassian.* Wall., 135, is decisive. The Circassian was captured May 4, 1862, for an attempted violation of the blockade of New Orleans. The city, including the ports below it on the Mississippi, was captured during the last days of April, and military possession of the city taken on May first. It was held that neither the capture of the forts nor the military occupation of the city terminated the blockade, upon the ground that it applied, not to the city alone, but controlled the port, which included the whole parish of New Orleans, and lay on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city. The following language of the Chief Justice is equally pertinent to this case: "Now, it may be well enough conceded that a continuous and complete possession of the city and the port, and of the approaches

from the Gulf, would make a blockade unnecessary, and would supersede it. But, at the time of the capture of the Circassian, there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile; the rebel army was in the neighborhood; the occupation, limited and recent, was subject to all the vicissitudes of war. Such an occupation could not at once, of itself, supersede or suspend the blockade. It might ripen into a possession which would have that effect, and it did; but at the time of the capture it operated only in aid and completion of the naval investment." The occupation of a city terminates a blockade because, and only because, it supersedes it, and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occupation of the mouth of the harbor does not necessarily terminate the blockade as to such places.

When occupation terminates blockade.

Granting the existence of a lawful and sufficient blockade at Guantanamo, its legal effect was a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business. It is well described by Sir William Scott in *The Vrouw Judith*, 1 C. Rob. 126, 128, "as a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that a neutral ship departing can only take away a cargo *bona fide* purchased and delivered, before the commencement of the blockade. If she afterwards takes on board a cargo it is a fraudulent act and a violation of the blockade." It is also said by Phillimore, 3 Int. Law, 383, that "the object of a blockade is to prevent exports as well as imports, and to cut off all communication of commerce with the blockaded place." The sailing of a vessel with a premeditated intent to violate a blockade is *ipso facto* a violation of the blockade, and renders the vessel subject to capture from the moment she leaves the port of departure. *Yeaton* v. *Fry*

Legal effect of sufficient blockade.

Intent is an *ipso facto* violation.

Cranch, 335; *The Circassian*, 2 Wall. 135; *The Frederick Molke*, 1 C. Rob. 72; *The Columbia*, 1 C. Rob. 130; *The Neptunus*, 2 C. Rob. 110; Wheaton on Captures, 196. If a master have actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty could not fail to lead to attempts to violate the blockade under pretext of approaching the port for the purpose of making such inquiries. *The Admiral*, 3 Wall. 603; *The Prize Cases*, 2 Black, 635, 677; Duer on Ins. 661; *The Cheshire*, 3 Wall. 231; *The James Cook*, Edwards, 261; *The Josephine*, 3 Wall. 83; *The Spes*, 5 C. Rob. 76; *The Betsy*, 1 C. Rob. 280; *The Neptunus*, 2 C. Rob. 110; *The Little William*, 1 Acton, 141, 161; *Sperry* v. *Delaware Ins. Co.*, 2 Wash., C. C. 243. If there be any distinction in this particular between a proclaimed blockade and an actual blockade by a naval commander, it does not aid the Adula in view of the admitted fact that she was informed by the Vixen that the port was under control of the United States military forces, and that the war ships were visible before she entered the bay.

Blockaded ports may not be knowingly approached.

In this connection we are cited by counsel for the Adula to a change in the law said to have been effected by the adhesion of this Government, at the beginning of the war, to the declaration of Paris abolishing privateering. This supposed change apparently rests upon an extract from a French treatise upon international law by Pistoye and Duverdy, vol. 1, p. 375, in which it is said that by the modern law, in consequence of the declaration of Paris, a vessel must be notified to depart from the blockaded port before she can be captured, and that the contrary rule was the result of the doctrine of the British Orders in Council during the Napoleonic wars, which is now given up by that country. It is also said that "the old rule was that it was a breach of blockade to enter upon a voyage to the blockaded port. This rule is now changed, because neutrals are obliged only to respect effective blockades. It may well be that a blockade of which official notice has been given is not an effective blockade, or it may be that a blockade which has been established by a sufficient force may have ceased to exist. Neutrals then have the right to begin a voyage to a blockaded port in order to see if the blockade still continues. They are only guilty when, while the blockade continues, they actually endeavor to break it."

Bearing of the Declaration of Paris.

We cannot, however, accept this opinion as overruling in any particular the prior decisions of this court in the cases above cited, to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. When Congress has spoken upon this subject it will be time enough for this court to act. We can not change our rulings to conform to the opinions of foreign writers as to what they suppose to be the existing law upon the subject.

Foreign opinions of supposed law cannot overrule Supreme Court's decisions.

We have not overlooked in this connection the provision contained in Art. 18 of Jay's treaty of 1794, to the effect that "whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed, that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained nor her cargo, if not contraband, confiscated, unless after notice she shall again attempt to enter." *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 185. Waiving the question whether this clause of Jay's treaty was abrogated by the war of 1812, and accepting it as a correct exposition of the law of nations, it applies only to vessels which have sailed for a hostile port or place without knowing that the same is either besieged, blockaded or invested. The whole case against the Adula depends upon the question whether those in charge of her knew before she left Kingston that Santiago and Guantanamo were blockaded. If they did, the treaty does not apply. If they did not, they are entitled to the benefit of this principle of international law. In the case of the *Maryland Ins. Co.* v. *Woods*, 6 Cranch, 29, in which it was held that the vessel could not be placed in the situation of one having notice of the blockade until she was warned off, the decision was placed upon the express ground that orders had been given by the British government, and communicated to our government, "not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them." This order was treated by the court as a mitigation of the general rule so far as respected blockades in the West Indies.

Basis of case against the Adula.

2. The questions concerning the notification of, and the intent to violate, blockade depend largely upon the same testimony, and may be properly disposed of together.

Ownership of the Adula.

There is no doubt that the Adula belonged to a British corporation, the Atlas Steamship Company; was registered in the name of the managing director of such corporation; flew the British flag, and prior to the Spanish-American war was engaged in general trade between Kingston and other ports on the coast of Jamaica, in connection with other steamers of the same line from New York, and from time to time had made voyages to Cuban ports. After the breaking out of the war the steamer was chartered by various persons, in the intervals of its regular work for voyages to Cuba. On May 7, in pursuance of a verbal arrangement between the agent of the steamship company and the American consul, the Adula was sent to Cienfuegos in Cuba to bring away refugees. On arrival off Cienfuegos she was boarded by officers of the U. S. S. Marblehead, who, upon being shown the permit and the ship's papers, allowed her to proceed, though the officers served the master with a printed copy of the President's proclamation blockading Cienfuegos and several ports on the north side of Cuba, and made a memorandum on the ship's log that they had done so. She sailed from Cienfuegos May 10, with 350 passengers, mostly women and children; was again boarded on leaving the port, but was allowed to proceed.

Previous charters.

On May 16, she was chartered by a Cuban refugee to proceed to Santiago; arrived there the following day, and returned with 200 passengers. No war ships were off Santiago at that time. She arrived at Kingston on the 19th, and landed her passengers.

On May 21, she was again chartered to go to Cienfuegos, having a permit from Washington, through the consul, to pass the blockade. She reached the blockading fleet on the 23d, was boarded by a boat from one of the vessels, and was again given permission to proceed; was arrested upon suspicion by the Spanish authorities in the port of Cienfuegos, but after a detention of sixty hours was released. She sailed again on May 26 directly for Kingston; saw no war ships in sight, and arrived at Kingston on May 28.

After making two of her ordinary coasting voyages around Jamaica, she was offered a further charter for Cienfuegos, but could not obtain the permission of the American consul, who told the master he had no authority to grant it. She left June 15, with a letter of instructions to the captain to proceed to the fleet off Cienfuegos,

then under a public blockade, to ask permission from them to enter the port, and if granted, to go in, and if not granted, to return to Jamaica. She arrived at Cienfuegos June 17; landed some provisions which had been shipped for her passengers, found no war ships there, and sailed away on the 19th with only ninety-eight passengers. Sixty miles S. S. E. from Cienfuegos she was stopped by the U. S. S. Yankee, and an officer sent on board. The master showed the boarding officer his instructions and the ship's papers, as well as the passenger list; was informed that Cienfuegos was blockaded, and that he must not enter it again. She arrived in Kingston on June 21; proceeded around the island on her usual coasting trip, and returned to Kingston on the 27th.

Last charter, and political character of the charterer.

She was chartered for her last voyage June 28, by one Solis, a Spanish subject, born near Havana, and living with his family at Manzanillo. He had landed recently from Manzanillo with a cargo of refugees. He had lived in Cuba, and at one time had been the French consul at Manzanillo, though there was no evidence that he had ever coöperated with the Spanish authorities during the war, or rendered aid or comfort to the Spanish forces. He had, however, a passport from the Spanish consul to enter the cities to which he was bound and take passengers away as refugees. He had previously been engaged in shipping supplies to Cuban ports and returning with passengers for Jamaica. He also carried a special personal Spanish passport granted the year before. Such being his political character, he entered into a charter party with the Atlas Steamship Company, under which he was at liberty to go to Manzanillo, Santiago and Guantanamo, and if not permitted to enter these harbors, to return to Kingston. An option was also given to the charterer for another similar voyage upon like terms upon twenty-four hours' notice after arrival at Kingston. The charter was for the conveyance of passengers from Cuban ports to Kingston at one hundred pounds per day. Solis was entered upon the ship's articles as supercargo. She was evidently chartered for his personal benefit, with power to name the port which she was to visit, but with no right to interfere with the navigation of the ship. Solis had made the same sort of trip twice before with English schooners, and expected upon this trip to make $19,000 profit. He appeared to have known nothing about the previous voyages of the Adula, and had seen her for the first time only about two

months before. The vessel bore a passport from the Spanish consul at Kingston; a bill of health *viséd* by the Spanish consul. With regard to his knowledge of the blockade at Guantanamo he testified as follows:

Charterer's knowledge of the blockade.

"I knew that there was a condition of war existing between America and Spain on the 21st. They told me on board the Adula that the blockade of Guantanamo was published on the 27th, the day before. I had not heard it before I left Kingston. I did not know officially Guantanamo was blockaded. On board the Adula I heard that on the 27th there was issued an order from the President of the United States declaring a blockade of the port of Guantanamo, but I did not know it until we arrived at Guantanamo. At Kingston I heard there were some war ships at Guantanamo, and I told Captain Forwood that the first thing I would do would be to go to the admiral and tell him my intentions. I did not think the papers in Kingston published the blockade. I did not see it if they did. The people generally did not talk about it. I read something about 'McCalla's camp.' I understood Guantanamo was not blockaded by the United States. I heard that marines had been landed at the entrance to Guantanamo, Caimenera—the bay is called Caimenera—and that the marines had possession of the port, and that the ships were inside. I cannot tell when I received the information that marines had been landed there and taken possession of the point of Guantanamo or Caimenera. Perhaps it was one or two days before. I don't know what the others knew about a state of war existing. I understood Guantanamo was not declared officially blockaded, although there were some vessels there. I got that information from newspapers in Kingston, and from those newspapers I got the information that marines had been landed at the entrance to the bay on the east side; they call it 'East Point.'"

Adula's agent warned of the blockade by the American consul.

It further appeared that the American consul warned Mr. Forwood, the agent of the ship at Kingston, of the existence of the blockade in the following language, as stated by the agent himself: "'Well, Forwood, I would not advise you to let the ship go; they won't let her into Guantanamo, and they will be watching for her.' I said to him, 'Oh, Dent, let me show you the captain's instructions. He has got orders to go to the fleet there and ask their permission to take some refugees.' 'Well,' he said, 'I don't know, but they will be watching for her, and I

think that Senor Solis is a Spanish agent, carrying $300,000 in gold to buy over the rebels in the American camp.' I told him that I had inquired about the man, and that it was one of the usual Kingston yarns." It also appears that Mr. Forwood knew that Mr. Solis was a Spaniard, and had been shipping supplies to Cuban ports. After taking on board a large supply of coal, the Adula left Kingston on June 28; rounded Morant Point on the east end of the island of Jamaica; proceeded at her usual speed toward Santiago, and sighted the blockading fleet off that port about noon of the 29th. The captain gives as his reason for going by the way of Santiago that he was not acquainted with the coast line to the eastward of that port; had no large scale chart, and therefore steered more to the westward than he should have done, because he knew the coast about Santiago, and did not know that about Guantanamo; but it is quite as probable that it was the presence of a number of war vessels off Santiago which sent her to Guantanamo. She was hailed by the Vixen within half a mile of the entrance to the harbor of Guantanamo, brought to, and then directed into the harbor, where several war vessels were lying, and was shortly thereafter seized by order of Commander McCalla of the Marblehead.

Certain testimony of the captain and of one of the crew.

In his testimony before the prize commissioners, Captain Yeates, master of the Adula, stated that he was stopped by the Vixen about half a mile from the entrance to the bay and permitted to proceed, and that it was not until after he had anchored that he was acquainted with the blockade of the harbor. One of the crew testified somewhat to the contrary and swore that "about three days before I left Kingston I heard that Guantanamo was blockaded; I heard it from people around the streets; I did not see it; I heard it was in the papers; I never heard any of the officers of the Adula or people on board talking about Guantanamo being blockaded, and I don't know exactly whether the owner or master or officers of the ship Adula knew that Guantanamo was blockaded. I knew about it, but I don't know anything about them. I don't know how I found it out, but I heard it on the streets of Kingston." He also swore "that at that time he went up to the mouth of the harbor, and at that time, when we got to Guantanamo, we found the war ships there blockading the harbor." A small cruiser, the Vixen, "ran up across our bow and the captain of the cruiser asked us: 'Didn't you sight the war

ships down at Santiago?' and the captain said, 'Yes.' And the captain stopped, and he said: 'Didn't you hear that Guantanamo was blockaded?' and our captain said 'Yes.' Then he said, 'You can proceed on.' I heard about the blockade in Kingston, but after leaving Kingston, until we met the cruiser, I never heard anything more about it." Captain Yeates also testified that he expected to be stopped when he approached Santiago. Mr. Solis, who had chartered the Adula for this voyage, testified that he was told, while on board the Adula, that the blockade of Guantanamo was published on the 27th, the day before, but that he had not heard of it before he left Kingston, though he had heard, while in Kingston, that there were some war ships at Guantanamo. At the time the Adula was captured she was searched for her ship's papers and other documents and letters. Several letters were found, as well as copies of a newspaper published at Kingston, which spoke of the American military and naval operations both at Santiago and Guantanamo.

Extracts from a Kingston newspaper.

Among these extracts from The Gleaner of June 14, 1898, is the following, apparently telegraphed from London: "A dispatch boat off Santiago reports that the Americans now hold thirty-five miles of the coast east of Santiago, including Guantanamo harbor, and that 20,000 Spanish troops at Santiago are preparing to desperately resist the Americans, who have landed 3,000 rifles, 300,000 rounds of ammunition, and large stores of provisions;" and the following from the issue of June 25: "On board the Adula, which arrived from Cienfuegos this week, there was an individual officially appointed by the Captain General in Cuba to make arrangements in Jamaica for regularly supplying the Spanish troops with provisions; in fact, to make Jamaica a base for Spanish purposes."

In this connection it would seem from the report of the Bureau of Navigation that the consul at Kingston telegraphed to Washington that the Under Secretary of the Captain General of Cuba and certain Spanish naval officers "came aboard the Adula with, it is supposed, $250,000 to purchase provisions to be taken to Manzanillo for Cervera. . . . Extensive preparations being made for shipping provisions to Cuba."

Letter of Captain Yeates to his parents.

In a letter from Captain Yeates to his parents, under date of July 13, and apparently written when the Adula was at Savannah, he says: "And now to tell you dear ones how it is or was that we got into this pickle, which

has not come as any surprise, as I have anticipated this for some time; it is I did not think I should be in command when it happened, but it was my luck to be, I suppose." Speaking of the capture, he says: "They turned the ship upside down; took my papers; measured the coals, and took stock generally. As far as the ship is concerned she was on perfectly legitimate business, fetching refugees. Whether Mr. Solis chartered the ship for that purpose alone, of course, has to be proved, and we are now on our way to Savannah for that purpose with a prize crew and Lieutenant Anderson in charge." In a postscript dated at Savannah, July 15, he says: "We have not yet reached the town proper, for we are going through the same performance as we did at Tampa, but I was not caught this time, for I managed to keep my things out of the oven."

Evidence of good faith of this expedition.

As tending to show the good faith of this expedition, and more particularly the owners of the Adula, much reliance is placed upon the letter of Mr. Forwood to Captain Yeates of June 28, the day upon which the Adula left Kingston, in which he instructs him, in case he finds American warships off Guantanamo, to stop immediately upon being signalled, and communicate to the commanding officer the object of the voyage, and to be careful upon his arrival "not to interfere, or in any way make any observations or sketches of anything you may see or hear of, but adhere strictly to the duties of your ship," and to observe the same precautions off Santiago. In this letter he also instructs him not to allow any provisions to leave the ship, or to do anything which could be interpreted as a breach of faith in being allowed to pass the blockade and enter the ports. While this letter doubtless tends to show good faith on the part of Mr. Forwood, still it was written with full information from Mr. Solis that the consul had refused to give him a passport, without permission from the American authorities in Washington. That Mr. Forwood recognized the necessity of an authority from Washington in order to pass the blockade is shown by his letter to Captain Walker of May 21, 1898, in reference to one of the voyages to Cienfuegos, in which he says: "In giving this letter to the blockade, be sure and ask the officer if he would allow the ship to pass another voyage without cabling to Washington."

From all the testimony in the case it appears very clear:

That Guantanamo was actually and effectively blockaded

by orders of Admiral Sampson from June 7 until after the capture of the Adula;

That the Adula was chartered to a Spanish subject for a voyage to Guantanamo, Santiago or Manzanillo, for the purpose of bringing away refugees, and that such voyage was primarily, at least, a commercial one for the personal profit of the charterer. During such charter she was to a certain extent, *pro hac vice*, a Spanish vessel, and a notice to Solis of the existence of the blockade was a notice to the vessel. *The Ranger*, 6 C. Rob. 126; *The Yonge Emilia*, 3 C. Rob. 52; *The Napoleon*, Blatch. Prize Cases, 296. The fact of her sailing under a Spanish passport—in fact, an enemy's license—is not devoid of significance. Indeed, we have in several cases regarded this as sufficient ground for condemnation. *The India*, 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 1 Wheat. 440; *The Ariadne*, 2 Wheat. 143. This passport gave the Adula authority to enter the Cuban ports and take away refugees, and it is a circumstance worthy of notice that it could not be found when the vessel was captured. Solis acknowledged its existence, but made no effort to account for its loss;

Status of neutral vessels chartered to an enemy; notice of blockade to charterer is notice to vessel.

Both Solis himself and the Adula had been previously engaged in similar enterprises to the coast of Cuba, and were chargeable with notice, not only of war between the United States and Spain, but with the fact of military and naval operations upon the southern coast of Cuba;

The fact of such war, that the object of it was the expulsion of the Spanish forces from Cuba, and that military and naval operations were being carried on by us with that object in view, must have been matters of common knowledge in Kingston, as well as the fact that the commerce with the southern ports of Cuba was likely to be interrupted, and that all intercourse with such ports would become dangerous in consequence of such war;

The Adula was not a cartel ship.

While the mission of the Adula was not an unfriendly one to this Government, she was not a cartel ship, privileged from capture as such, but one employed in a commercial enterprise for the personal profit of the charterer, and only secondarily, if at all, for the purpose of humanity. Her enterprise was an unlawful one, in case a blockade existed, and both Solis and the master of the Adula were cognizant of this fact. The direction of the commanding officer of the Vixen, which overhauled the Adula off Guantanamo, to enter the harbor, cannot be construed as a permission to violate the blockade, as such permission

would not be within the scope of his authority. *The Hope*, 1 Dod. 226; *The Amado*, Newb. 400; *The Joseph*, 8 Cr. 451; *The Benito Estenger*, post, 568.

That upon arrival off Santiago the blockading fleet was plainly visible, and we think there is a preponderance of evidence to the effect that both Solis and the master of the Adula knew of the actual blockade, that it was generally known in Kingston before she sailed, and that the Adula was chargeable with a breach of it, notwithstanding the letter of instructions from Mr. Forwood to Captain Yeates. As the blockade had been in existence since June 7, it is scarcely possible that, in the three weeks that elapsed before the Adula sailed, it should not have been known in Kingston, which is only a day's trip from the southern coast of Cuba, and with which it appears to have been in frequent communication. This probability is confirmed by the direct testimony of the sailor Morris, that it was matter of common talk in Kingston. The testimony of Solis, that he did not know "officially" that Guantanamo was blockaded, by which we are to understand that it had not been officially proclaimed, is perfectly consistent with a personal knowledge of the actual fact. His statement seems to be little more than a convenient evasion. Upon the principle already stated his knowledge was the knowledge of the ship.

Knowledge of Solis was knowledge of the ship.

We think the facts herein stated outweigh the general statement of the officers that they had not heard of the blockade.

3. There was no error in denying the motion of the claimant to take further proofs. It appears from the opinion of the court that "the hearing upon the proceedings for condemnation was upon the evidence afforded by the examination of the captured crew taken upon standing interrogatories, the ship's papers, and other evidence of a documentary character found upon the ship by the captors. This was done in conformity to the established rule in prize causes."

The motion to take further proof was made upon the affidavit of Robert Gemmell, the New York agent of the company, the statement of W. P. Forwood, the Kingston agent, annexed thereto, as well as his own affidavit and exhibits, and upon the counter testimony of Anderson, Ellenberg and Gill taken *de bene esse*. Upon the hearing of this motion the court considered the allegations of Forwood, attached to Gemmell's affidavit, as if Forwood had

testified upon depositions regularly taken, giving due weight to the same in connection with other evidence in the case; and was of opinion that the evidence as it stood was not susceptible of any satisfactory explanation; and comparing the proof proposed to be brought forward with that already in the case, came to the conclusion that the legal effect of the facts before the court could not be varied by the explanation offered. The motion was denied. In considering this case we have also given effect to these affidavits, and have come to the conclusion that, if they are to be taken as true, and the further proofs, if taken, would support them, they would not change our opinion with respect to the affirmance of the decree.

Order for further proof is always made with extreme caution.

If an examination of the ship's papers and of the crew, taken *in preparatorio*, upon which the cause is first heard in the District Court, make a case for condemnation, the order for further proof is, as stated in *The Gray Jacket*, 5 Wall. 342, 368, always made with extreme caution, and only where the interests of justice clearly require it. If the ship's papers and the testimony of the crew do not justify an acquittal, it is improbable that a defence would be established by further proof; and as the interest of all parties require that prize causes be quickly disposed of, it is only where the testimony *in preparatorio* makes a case of grave doubt, that the court orders the taking of further proofs. *The Pizarro*, 2 Wheat. 227; *The Amiable Isabella*, 6 Wheat. 1, 77; Benedict's Adm'y, sec. 512 *a*; Story on Prize Courts, 17.

Sir William Scott on the taking of further proof.

It was said by Sir William Scott in *The Sarah*, 3 C. Rob. 330, that "it has seldom been done except in cases where there has appeared something in the original evidence, which lays a suggestion for prosecuting the inquiry farther. In such case the court has allowed it; but when the matter is foreign, and not connected with the original evidence of the cause, it must be under very peculiar circumstances indeed that the court will be induced to accede to such an application; because, if remote suggestions were allowed, the practice of the court would be led away from the simplicity of prize proceedings, and there would be no end to the accumulation of proof that would be introduced in order to support arbitrary suggestions."

These remarks are specially pertinent to the offer of further proof that, while Solis owed allegiance to the Queen of Spain, yet, that he left Cuba soon after the war broke out, took no part in the hostilities, but on the con-

trary had done all in his power while he remained in Cuba to assist citizens of the United States residing there; had sided with the natives of Cuba, and was desirous that a government should be established in the island under the auspices of the United States. As was observed in the very satisfactory opinion of the District Judge in this case, this evidence was altogether irrelevant to the case of the Adula, and was, to a certain extent, a contradiction of his testimony before the prize commissioners that he was a loyal subject of Spain, bore a Spanish passport, and carried a bill of health *viséd* by the Spanish consul at Kingston. It would throw the whole practice in prize cases into confusion if the testimony, taken *in preparatorio*, when the facts are fresh in the minds of the witnesses, were subject to be contradicted by the same witnesses after its weak points had been developed. It was said by Mr. Justice Story in *The Pizarro* 2 Wheat. 227: "Nor should the captured crew have been permitted to be reëxamined in court. They are bound to declare the whole truth upon the first examination; and if they fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements after counsel has been taken, and they know the pressure of the cause. Public policy and justice equally point out the necessity of an inflexible adherence to this rule."

Story on reexamination.

Upon the whole, we think the decree of the District Court was correct, and it is therefore

Judgment.

Affirmed.

Mr. Justice Shiras, with whom concurred Mr. Justice Gray, Mr. Justice White and Mr. Justice Peckham, dissenting.

* * * * * * *

Case of the Panama.

(Vol. 176, United States Reports, p. 535. Decided February 26, 1900.)

Mr. Justice Gray delivered the opinion of the court.

This was a libel for the condemnation of the steamship Panama as prize of war, and was heard in the District Court upon the libel, the claim of the master in behalf of the owner of the vessel, and the depositions *in preparatorio* of her master, her supercargo, and her chief engineer, which showed the following state of facts:

Statement of the case.

The Panama was a steamship of 1432 tons register; was owned by the Compania Transatlantica, a corporation of Barcelona in Spain; sailed under the Spanish flag; had a commission as a royal mail ship from the Government of Spain; carried a crew of 71 men all told, who had been shipped at different times at Havana; and her usual course of voyage included the ports of New York and Havana, and Progreso, Vera Cruz and other Mexican ports, with general cargoes, passengers and mails.

Her last voyage began in Havana, for a round trip by way of New York, and was to have ended in Vera Cruz. She sailed from New York at half past two o'clock in the afternoon of April 20, 1898, with a clearance from the custom-house at that port for Havana, Progreso, and Vera Cruz, having on board the United States mails, 29 passengers (all Spaniards except one Frenchman) and a general cargo, the produce or manufacture of the United States, shipped at New York, and to be delivered, at the risk of the shippers, to consignees at those ports. She pursued the usual course of ships bound southward along the coast until she passed Alligator Reef light on the coast of Florida, and then bore away for Havana, and sighted the Cuban coast on the morning of April 25; and on that day, when about twenty-five miles from Havana, was captured by the United States ship of war Mangrove, and was sent in charge of a prize crew into Key West. She had no military or naval officer on board, made no resistance to the capture, and delivered all her papers and mails to the prize master.

Armament of the Panama carried in accordance with a contract with the Spanish Government.

There were mounted on board the Panama, at the time of her capture, five guns: Two breech-loading Hontoria 9 centimetre guns, one on each side of the ship, with 30 rounds of shot for each; one Maxim rapid-firing gun, on the bridge, with ammunition; and two signal guns, one on each side of the pilot house, with ammunition. She also had on board about twenty Remington rifles and ten Mauser rifles, with ammunition for each, and about thirty or forty cutlasses. The cannon had been put on board about three years before, and the small arms and ammunition had been on board a year or more. She was so armed in accordance with a contract with the Spanish Government, which required all the mail steamships of the company to be armed, and article 26 of which was as follows: "Every ship shall take on board, for her own defence, the following armament: Two Hontoria 9 centi-

metre guns, with powder and ammunition for 30 shots for each piece; twenty Remington rifles, with 100 rounds apiece, and bayonet or sword-bayonet; and twenty cutlasses."

The master of the Panama moved the court to allow further proof upon the matters set forth in two test affidavits, filed by leave of the court, in which he testified more distinctly that the mounted guns and small arms which the Panama carried had not been shipped for the purpose of war, or in expectation of hostilities between the Spanish Government and the United States, but were taken on board pursuant to the requirements of that contract; and also testified that the Spanish Government had never taken possession of the Panama under the terms of the contract; and that until the capture he and his officers were ignorant of the existence of the war between Spain and the United States, and of any blockade of the port of Havana. And he asked leave to submit to the court the whole contract, as contained in a printed book, which was in the chart room of the Panama, and in the custody of the prize master, and which he has since sent up to this court as one of the exhibits in the cause.

Contract concluded in 1886.

By that contract, concluded between the Spanish Government and the Compania Transatlantica on November 18, 1886, and drawn up and printed in Spanish, the company bound itself to establish and to maintain for twenty years various lines of mail steamships, one of which included Havana, New York and other ports of the United States and of Mexico; and the Spanish Government agreed to pay certain subsidies to this company, and not to subsidize other steamship lines between the same points. Among the provisions of the contract, besides article 26, above quoted, were the following:

Terms of the contract.

By article 25 new ships of the West Indian line must be of iron, or of the material which experience may prove to be the best; must have double-bottomed hulls, divided into water-tight compartments, with all the latest improvements known to the art of naval construction; and "their deck and sides shall have the necessary strength to support the artillery that they are to mount." All the ships of that line must have a capacity for 500 enlisted men on the orlop deck, and a convenient place for them on the main deck. The company, when beginning to build a new ship, shall submit to the Minister of the Colonies her plans as prepared for commercial and postal service; "the Minister shall

Terms of the contract.

cause to be studied the measures that should be taken looking to the rapid mounting in time of war of pieces of artillery on board of said vessel; and may compel the company to do such strengthening of the hull as he may deem necessary for the possible mounting of that artillery; said strengthening shall not be required for a greater number than six pieces whose weight and whose force of recoil do not exceed those of a piece of fourteen centimetres." The plans of ships already built shall be submitted to the Minister of Marine, in order that he may cause to be studied the measures necessary to adapt them to war service; and any changes that he may deem necessary or possible for that end shall be made by the company. But in both old and new ships the changes proposed by the Ministry must be such as not to prejudice the commercial purposes of the vessels.

By article 35, the vessels, with their engines, armaments and other appurtenances, must be constantly maintained in good condition for service.

By article 41, the officers and crews of the vessels, and, as far as possible, the engineers, shall be Spaniards.

By article 49, the company may employ its vessels in the transportation of all classes of passengers and merchandise, and engage in all commercial operations that will not prejudice the service that it must render to the state.

By article 60, when by order of the Government munitions of war shall be taken on board, the company may require that it shall be done in the manner and with the precautions necessary to avoid explosions and disasters.

By article 64, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's ship, the Government may take possession of them with their equipment and supplies, having a valuation of the whole made by a commission composed of two persons selected by the Government, two by the company, and a fifth person chosen by those four; at the termination of the war, the vessels with their equipment are to be returned to the company, and the Government is to pay to the company an indemnity for any diminution in their value, according to the opinion of the commission, and is also, for the time it has the vessels in its service, to pay five per cent on the valuation aforesaid. By article 66, at the end of the war, the Government may relieve the company of the performance

of the contract if the casualties of the war have disabled it from continuing the service. And by article 67, in extraordinary political circumstances, and though there be no naval war, the Government may charter one or more of the company's vessels, and in that event shall pay an indemnity estimated by the aforesaid commission. Terms of the contract.

The District Court denied the motion of the master to take further proof; restored parts of the cargo to claimants thereof; gave claimants of other parts of the cargo leave to introduce further proof; and entered a final decree of condemnation and sale of the Panama and the rest of her cargo, upon the ground that she was enemy's property, and was upon the high seas at the time of the President's proclamation exempting certain vessels from arrest. 87 Fed. Rep. 927. The court also, on the application of the commodore commanding at Key West, and on the recommendation of the prize commissioners, ordered all the mounted guns and the ammunition therefor to be appraised by two officers of the Navy, and delivered to the commodore for the use of the Navy Department. The master of the Panama appealed to this court from the decree condemning the vessel.

The recent war with Spain, as declared by the act of Congress of April 25, 1898, c. 189, and recognized in the President's proclamation of April 26, 1898, existed on and after April 21, 1898. 30 Stat. 364, 1770. This proclamation declared, among the rules on which the war would be conducted, the following: Certain articles in the President's proclamation of April 26, 1898.

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any dispatch of or to the Spanish government."

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the

clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

Decision in the general case of vessels sailing before war began.

It has been decided by this court, in the recent case of *The Buena Ventura*,[a] 175 U. S. 384, that a Spanish merchant vessel, which had sailed before April 21, 1898, from a port of the United States on a voyage to a foreign port, not having on board any officer in the military or naval service of Spain, nor any article contraband of war, nor any dispatch of or to the Spanish Government, was protected by the fourth clause of the President's proclamation of April 26, 1898, from condemnation while on that voyage; but that her capture, before that proclamation was issued, was with probable cause; and that she should therefore be ordered to be restored to her owner, but without damages or costs.

That case would be decisive of this one, but for the mails and the arms carried by the Panama, and the contract with the Spanish Government under which the arms were put on board.

It was argued in behalf of the claimant that, independently of her being a merchant vessel, she was exempt from capture by reason of her being a mail steamship and actually carrying mail of the United States.

No international rule exempts mail ships from capture.

There are instances in modern times, in which two nations, by convention between themselves, have made special agreements concerning mail ships. But international agreements for the immunity of the mail ships of the contracting parties in case of war between them have never, we believe, gone further than to provide, as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar conventions, that the mail packets of the two nations shall continue their navigation, without impediment or molestation, until a notification from one of the governments to the other that the service is to be discontinued; in which case they shall be permitted to return freely, and under special protection, to their respective ports. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. 9 Stat. 969; Wheaton, (8th ed.) pp. 659–661, Dana's note; Calvo, (5th ed.) §§ 2378, 2809; De Boeck, §§ 207, 208. De Boeck, in § 208, after observ-

[a] See page 70, preceding.

ing that, in the case of mail packets between belligerent countries, it seems difficult to go further than in the convention of 1833, above mentioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country, as follows: "It goes without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets? There can be no question of intercepting neutral packets, because communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept, and seize the enemy's mail packets."

The provision of the sixth clause of the President's proclamation of April 26, 1898, relating to interference with the voyages of mail steamships, appears by the context to apply to neutral vessels only, and not to restrict in any degree the authority of the United States, or of their naval officers, to search and seize vessels carrying the mails between the United States and the enemy's country. Nor can the authority to do so, in time of war, be affected by the facts that before the war a collector of customs had granted a clearance, and a postmaster had put mails on board, for a port which was not then, but has since become, enemy's country. Moreover, at the time of the capture of the Panama, this proclamation had not been issued. Without an express order of the Government, a merchant vessel is not privileged from search or seizure by the fact that it has a government mail on board. *The Peterhoff*, 5 Wall. 28, 61.

Ships carrying government mail exempt only by express order of the government.

The mere fact, therefore, that the Panama was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture.

The remaining question in the case is whether the Panama came within the class of vessels described in the fourth clause of the President's proclamation of April 26, 1898, as "Spanish merchant vessels," and as not "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any dispatch of or to the Spanish government."

Status of the Panama under fourth clause.

Contraband; distinction between arms carried as cargo and as permanent equipment.

On the part of the claimant, it was argued that the arms which the Panama carried, under the requirements of her mail contract and for the protection of the mails, are not to be regarded as contraband or munitions of war, within the sense of this clause; that "contraband," as therein referred to, means contraband cargo, not contraband portion of the ship's permanent equipment; and that, if the furnishings of a ship could be regarded as contraband, every ship would have contraband on board.

On the other hand, it was contended, in support of the condemnation, that the arms which the Panama carried, belonging to her owner, were contraband of war, and rendered her liable to capture; and that by reason of her being so armed, and of the provisions of her mail contract with the Spanish government, requiring her armament, and recognizing the right of that government, in case of a suspension of the mail service by war, to take possession of her for warlike purposes, she can not be considered as a merchant vessel, within the meaning of the proclamation, but must be treated like any regular vessel of the Spanish navy under similar circumstances.

The Pégou or *Pigou.*

The claimant much relied on a case decided in 1800 by the French Council of Prizes, in accordance with the opinion and report of Portalis, himself a high authority. Wheaton, (8th ed.) p. 460; De Boeck, § 81. In the case referred to, an American vessel, carrying ten cannon of various sizes, together with muskets and munitions of war, had been captured by French frigates; and had been condemned by two inferior French tribunals, upon the ground that she was armed for war, and had no commission or authority from her own government. The claimants contended that their ship, being bound for India, was armed for her own defence, and that the munitions of war, the muskets and the cannon that composed her armament did not exceed what was usual in like cases for long voyages. Upon this point, Portalis, acting as commissioner of the French government, reported his conclusion on the question of armament as follows: "For my part, I do not think it is enough to have or to carry arms, to incur the reproach of being armed for war. Armament for war is of a purely offensive nature. It is established when there is no other object in the armament than that of attack, or, at least, when everything shows that such is the principal object of the enterprise; then a vessel is deemed enemy or pirate, if she has no commission or papers sufficient to

remove all suspicion. But defence is a natural right, and means of defence are lawful in voyages at sea, as in all other dangerous occupations of life. A ship which had but a small crew, and a considerable cargo, was evidently intended for commerce, and not for war. The arms found on this ship were evidently intended, not for committing acts of rapine or hostility, but for preventing them; not for attack, but for self-defence. The pretext of being armed for war therefore appears to me to be unfounded." The Council of Prizes, upon consideration of the report of Portalis, adjudged that the capture of the vessel and her cargo was null and void, and ordered them to be restored, with damages. *The Pégou* or *Pigou*, 2 Pistoye et Duverdy, Prises Maritimes, 51; *S. C.* 2 Cranch, 96–98, and note.

The Pégou was a neutral, not an enemy, vessel.

But in that case the only question at issue was whether a neutral merchant vessel, carrying arms solely for her own defence, was liable to capture for want of a commission as a vessel of war or privateer. That the capture took place while there was no state of war between France and the United States is shown by her being treated, throughout the case, as a neutral vessel; if she had been enemy's property, she would have been lawful prize, even if she had a commission, or if she were unarmed. She was not enemy's property, nor in the enemy's possession, nor bound to a port of the enemy; nor had her owner made any contract with the enemy by which the enemy was, or would be, under any circumstances, entitled to take and use her, either for war, or for any other purpose.

Arms and ammunition are generally contraband.

Generally speaking, arms and ammunition are contraband of war. In *The Peterhoff*, 5 Wall. 28, Chief Justice Chase, delivering the judgment of this court, said: "The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured, and primarily and ordinarily used, for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always

contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." And it was adjudged that so much of the cargo of the Peterhoff, as consisted of artillery harness, artillery boots, and army shoes and blankets, came fairly under the description of goods primarily and ordinarily used for military purposes in time of war; and, being destined directly for the use of the rebel military service, came within the second, if not within the first class of goods contraband of war. 5 Wall. 58.

But not when kept on board for defence against "enemies, pirates, and assailing thieves."

Yet it must be admitted that arms and ammunition are not contraband of war, when taken and kept on board a merchant vessel as part of her equipment, and solely for her defence against "enemies, pirates, and assailing thieves," according to the ancient phrase still retained in policies of marine insurance. Pratt, in his essay on the Law of Contraband of War, speaking of the class of "articles which are of direct use in war," says: "With respect to these no question can arise. On proof of the use of the article being solely or particularly applicable to hostile purposes, the conveyance of it to the enemy would amount to such a direct interposition in the war as necessarily to entail the confiscation of the property." But he afterwards adds this qualification: "But even in the case of articles of direct use in war, an exception is always made in favor of such a quantity of them as may be supposed to be necessary for the use or defence of the ship." And again, speaking of "warlike stores," he says: "These are, from their very nature, evidently contraband; but every vessel is, of course, allowed to carry such a quantity as may be necessary for purposes of defence; this provision is expressly introduced in many treaties." Pratt, Contraband of War, xxii, xxv, xl. And at pages 239, 244, 245 of his appendix he quotes express provisions to that effect in the treaties between Great Britain and Russia in 1766, 1797 and 1801. See also *Cases of Dutch and Spanish Ships*, 6 C. Rob. 48; *The Happy Couple*, Stewart Adm. (Nova Scotia) 65, 69; Madison, quoted in 3 Whart. Int. Law Dig. § 368, p. 313.

Arms for defence not conclusive evidence of character.

But the fact that arms carried by a merchant vessel were originally taken on board for her own defence is not conclusive as to her character. This is clearly shown by

the case of *The Amelia*, (1801) reported by the name of *Talbot* v. *Seeman*, 1 Cranch, 1. In that case, during the naval warfare between the United States and France near the end of the last century, a neutral merchant vessel, having eight iron cannon and eight wooden guns mounted on board, and a cargo of merchandise, sailed from Calcutta for Hamburg, both being neutral ports; and before reaching her destination was captured by a French cruiser, and put by her captors, with the cannon still on board, in charge of a French prize crew, with directions to take her into a French port for adjudication as prize; and on her way thither was recaptured by a United States ship of war. The recapture was held to be lawful, and to entitle the recaptors to salvage before restoring the vessel to her neutral owner, because, as Chief Justice Marshall said, "The Amelia was an armed vessel commanded and manned by Frenchmen," "she was an armed vessel under French authority, and in a condition to annoy the American commerce." 1 Cranch, 32. And in *The Charming Betsy*, (1804) 2 Cranch, 64, that case was expressly approved, as a precedent to be followed under similar circumstances; but was held to be inapplicable where the arms on board at the time of the recapture were but a single musket and a small amount of powder and ball. 2 Cranch, 121. Notwithstanding that the Amelia was a neutral vessel, with an armament originally taken on board for defence only, and therefore, while in the possession of her neutral owner, would not (according to the French case above cited) have been liable to capture as an armed vessel, yet, after she had been taken possession of by the enemy, with the same armament still on board, and thus was in a condition to be used by the enemy for hostile purposes, the fact that the original purpose of the armament was purely defensive did not prevent her from being considered as an armed vessel of the enemy.

The Amelia.

While the authorities above referred to present principles and analogies worthy of consideration in the case at bar, they furnish no conclusive rule to govern its determination. The decision of this case must depend upon its own facts, and upon the true construction of the President's proclamation.

Authorities quoted furnish no conclusive rule for this case.

As to the facts, there is no serious dispute. The matters stated in the test affidavits upon which the motion for further proof was based add nothing of importance to the facts disclosed by the testimony *in preparatorio*, and by

the mail contract between her owner and the Spanish Government, which forms part of the ship's papers.

Résumé.

The Panama was a steamship of 1432 tons register, carrying a crew of 71 men all told, owned by a Spanish corporation, sailing under the Spanish flag, having a commission as a royal mail ship from the Government of Spain, and plying from and to New York and Havana and various Mexican ports, with general cargoes, passengers and mails. At the time of her capture, she was on a voyage from New York to Havana, and had on board two breech-loading Hontoria guns of nine centimetre bore, one mounted on each side of the ship, one Maxim rapid-firing gun on the bridge, twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. The guns had been put on board three years before, and the small arms and ammunition had been on board a year or more. Her whole armament had been put on board by the company in compliance with its mail contract with the Spanish Government, (made more than eleven years before and still in force,) which specifically required every mail steamship of the company to "take on board, for her own defence," such an armament, with the exception of the Maxim gun and the Mauser rifles.

That contract contains many provisions looking to the use of the company's steamships by the Spanish Government as vessels of war. Among other things, it requires that each vessel shall have the capacity to carry 500 enlisted men; that that government, upon inspection of her plans as prepared for commercial and postal purposes, may order her deck and sides to be strengthened so as to support additional artillery; and that, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's vessels, the Government may take possession of them with their equipment and supplies, at a valuation to be made by a commission; and shall, at the termination of the war, return them to the company, paying five per cent on the valuation while it has them in its service, as well as an indemnity for any diminution in their value.

Panama's liability to capture, irrespective of armament.

The Panama was not a neutral vessel; but she was enemy property, and as such, even if she carried no arms, (either as part of her equipment, or as cargo,) would be liable to capture, unless protected by the President's proclamation.

It may be assumed that a primary object of her armament, and, in time of peace, its only object, was for purposes of defence. But that armament was not of itself inconsiderable, as appears, not only from the undisputed facts of the case, but from the action of the District Court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish Government, pursuant to which the armament had been put on board, expressly provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war.

Panama's true character.

She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes.

The intent of the fourth clause of the President's proclamation was to exempt for a time from capture peaceful commercial vessels; not to assist the enemy in obtaining weapons of war. This clause exempts "Spanish merchant vessels" only; and expressly declares that it shall not apply to "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government."

Upon full consideration of this case, this court is of opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a dispatch, of the enemy, cannot reasonably be construed as including, in the description of "Spanish merchant vessels" which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser of the enemy's navy, in the war with this country.

Judgment.

The result is, that the Panama was lawfully captured and condemned, and that the decree of the District Court must be

Affirmed.

Mr. Justice Peckham dissented.

Case of the Benito Estenger.

(Vol. 176, United States Reports, p. 568. Decided March 5, 1900. Mr. Chief Justice Fuller delivered the opinion of the court.)

Statement of the case.

The Benito Estenger was captured by the U. S. S. Hornet on June 27, 1898, off Cape Cruz on the south side of the island of Cuba, and was brought into the port of Key West and duly libelled on July 2. The depositions *in preparatorio* of Badamero Perez, Edwin Cole and Enrique de Messa were taken, and thereafter and on July 27 a claim was interposed by Perez as master of the steamer on behalf of Arthur Elliott Beattie, a British subject, as owner, supported by test affidavits of himself and de Messa. The cause was preliminarily heard on the libel, the depositions *in preparatorio* and the test affidavits, and sixty days given for further proofs. Accordingly the depositions of the claimant and sundry others were taken on behalf of the claimant, and the testimony of the consul of the United States at Kingston on behalf of the captor. The cause coming on for final hearing, the court entered a decree December 7, 1898, condemning the vessel as lawful prize as enemy property, and ordering her to be sold in accordance with law. Claimant thereupon appealed, and assigned errors to the effect in substance that the court erred in failing to hold that the Benito Estenger was a British merchant ship, duly documented and entitled to the protection of the British flag, and lawfully owned and registered by a subject domiciled in Great Britain; and also in holding that the Benito Estenger was lawful prize of war, inasmuch as she was engaged on a voyage in behalf of the local Cuban junta in Kingston, allies of the United States, and when captured was in the service of the United States, and employed in friendly offices to the forces of the United States. The vessel prior to June 9, 1898, was the property of Enrique de Messa, of the firm of Gallego, de Messa and Company, subjects of Spain and residents of Cuba. On that day a bill of sale was made by de Messa to the claimant, Beattie, a British sub-

ject, and, on compliance with the requirements of the British law governing registration, was registered as a British vessel in the port of Kingston, Jamaica. The vessel had been engaged in trading with the island of Cuba, and more particularly between Kingston and Montego, Jamaica, and Manzanillo, Cuba. She left Kingston on the 23d of June, and proceeded with a cargo of flour, rice, cornmeal and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo at 2 o'clock A. M., June 27, for Montego, and then for Kingston, and was captured at half-past five of that day off Cape Cruz. The principal question was as to the ownership of the vessel and the legality of the alleged transfer, but other collateral questions were raised in respect of the alleged Cuban sympathies of de Messa; service on behalf of the Cuban insurgents in the United States; and the relation of the United States consul to the transactions which pre ceded the seizure. It was argued that the vessels of Cuban insurgents and other adherents could not be deemed property of the enemies of the United States; that this capture could not be sustained on the ground that the vessel was such property; that the conduct of de Messa in his sale to Beattie was lawful, justifiable, and the only means of protecting the vessel as neutral property from Spanish seizure; and finally, that this court could and should do justice by ordering restitution, under all circumstances of the case.

Statement of the case.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

Opinion.

If the alleged transfer was colorable merely, and Messa was the owner of the vessel at the time of capture, did the District Court err in condemning the Benito Estenger as lawful prize as enemy property?

"Enemy property" is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. And by the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal conse-

Illegal traffic stamps property as hostile.

quences. *Prize Cases*, 2 Black, 635, 674; *The Sally*, 8 Cranch, 382, 384; *Jecker* v. *Montgomery*, 18 How. 110; *The Peterhoff*, 5 Wall. 28; *The Flying Scud*, 6 Wall. 263.

Messa was a Spanish subject, residing at Santiago, and for years engaged in business there. His vessel had a Spanish crew and Spanish officers, and he testified that he was on board of her as supercargo. She had the Spanish flag in her lockers, though she was flying the British flag at the moment, under a transfer, which, as presently to be seen, was colorable and invalid. There was evidence tending to show that Messa sympathized with the Cuban insurgents, but no proof that he was himself a Cuban rebel or that he had renounced his allegiance to Spain. The vessel carried to Manzanillo on this voyage a cargo of provisions, consisting principally of eleven hundred barrels of flour.

Manzanillo was a city of several thousand inhabitants and the first important place on the south Cuban coast between Santiago and Cienfuegos, lying inside the bay formed by the promontory which Cape Cruz terminates, and about sixty miles northeast of the cape. Cape Cruz is about due north from Montego Bay on the northwestern shore of Jamaica, and about seventy-five miles distant, while Kingston is on the southeastern coast of Jamaica. The record lacks evidence of the condition of affairs there at that time, but official reports leave no doubt that it was defended by several vessels of war and by shore batteries, and was occupied by some thousands of Spanish soldiers. On the 6th of April, 1898, the Secretary of the Navy had instructed Admiral Sampson, among other things, that the Department desired, "that in case of war, you will maintain a strict blockade of Cuba, particularly the ports of Havana, Matanzas, and, if possible, Santiago de Cuba, Manzanillo and Cienfuegos." Manzanillo was the terminus of a cable which connected with Santa Cruz, Trinidad, Cienfuegos and Havana, and was subsequently cut by the forces of the United States, in order to check the inland traffic with Manzanillo and to prevent the calling of reënforcements to resist the capture of that place. And it appeared that Admiral Sampson had been for some weeks endeavoring to stop blockade running on the south coast of Cuba, and that a large vessel with a heavy battery was stationed at Cape Cruz. Manzanillo was not declared blockaded, however, until the proclamation of June 27, 1898; but the consul of the United States at Kingston had

warned Messa and Beattie that a blockade in fact existed. The claimant testified that the vessel was chartered by Flouriache, a Cuban merchant, and that the cargo was consigned to Bauriedel and Company, at Manzanillo. The deposition of neither of these was taken. According to the explicit testimony of the consul, he was informed by both the claimant and his brother that the flour was transferred by Bauriedel and Company, through a communicating way from their warehouse to the Spanish government warehouse, immediately upon its delivery; and no evidence to contradict this was introduced.

The instructions of the Navy Department to "Blockading Vessels and Cruisers," in the late war, included among articles conditionally contraband, "Provisions, when destined for an enemy's ship or ships, or for a place that is besieged."

Story on provisions as contraband.

In *The Commercen*, 1 Wheat. 382, 388, Mr. Justice Story said: "By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. . . . If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."

Sir William Scott on the same question.

In *The Jonge Margaretha*, 1 C. Rob. 189, 193, Sir William Scott discussed this question, and, after referring to many instances, concluded: "And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it."

But while alluding to this subject by way of illustration we do not feel called on to consider under what particular circumstances, generally speaking, provisions may be held contraband of war. It is enough that in dealing with a vessel adjudicated to have been an enemy vessel, the fact of trade with the enemy, especially in supplies necessary for the enemy's forces, is of well nigh decisive importance.

Trade with the enemy on an enemy vessel decisive.

In reply it is suggested that this cargo was intended for the Cuban insurgents, and a quotation is made from a letter of the consul to the effect that he had been "told privately by the president of the local junta, who has performed valuable services for me, that the proceeds of this cargo

are to be forwarded to the Cuban government and troops through the Cuban agent at Manzanillo." The suggestion derives no support from the record, and the facts remain that the provisions were delivered to the Spanish government, and that the trade to this Spanish stronghold constituted, under the laws of war, illicit intercourse with the enemy.

This brings us to consider the contention that Messa had rendered important services to the United States; that he was the friend and not the enemy of this Government, and that there was an agreement between him and the United States consul which operated to protect the vessel from capture. But Messa's status was that of an enemy, as already stated, and this must be held to be so notwithstanding individual acts of friendship, certainly since there was no open adherence to the Cuban cause, and allegiance could have been shifted with the accidents of war. The legal conclusion was not affected by the fact that Messa had, in cultivating friendly relations with the consul, given the latter an old Government plan of the province of Santiago and an especially prepared chart of the harbor. Thus displaying his amicable inclinations, he endeavored to obtain from the consul a letter of protection for the voyage he was about to undertake, but this the consul declined to furnish, and informed him at the same time that Manzanillo was blockaded, and that the contemplated venture would be at his own risk.

Enemy status unchanged by individual friendly acts.

Nevertheless, the consul agreed to write the Admiral, and did write him June 23, that Messa offered to give certain information that might be valuable, and that he proposed to be off Cape Cruz on June 30, when he could be picked up there and taken to the Admiral if desired; but the consul said: "You quite understand that in dealing with those people, one is always more or less liable to imposition. I therefore make no recommendation of Messa to you." There was nothing to show that the voyage was undertaken on the strength of this letter or that it in any way contributed to the capture, nor that the Admiral intended to avail himself of the suggestion in regard to Messa.

The claimant asserted and the consul denied that protection to the voyage was extended by the latter. But we do not go at length into this matter because we think that no engagement with the United States nor any particular service to the United States was made out in that connec-

tion, and so far as appears the vessel was captured in the ordinary course of cruising duty at a time and under circumstances when her liability was not to be denied. Moreover, a United States consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation. This was so held by Judge McCaleb in *Rogers* v. *The Amado*, Newberry, 400, in which he quotes the language of Sir William Scott in *The Hope*, 1 Dodson, 226, 229: "To exempt the property of enemies from the effect of hostilities, is a very high act of sovereign authority; if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed *mandatories*, or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. '*Ei rei non præponitur;*' and therefore his acts relating to it are not binding."

United States consuls may not grant licenses of exemption to enemy vessels.

In *The Joseph*, 8 Cranch, 451, the vessel was condemned for trading with the enemy, and it was held that she was not excused by the necessity of obtaining funds to pay the expenses of the ship, nor by the opinion of an American minister expressed to the master, that by undertaking the voyage he would violate no law of the United States. The court said that these considerations, "if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision."

The Joseph.

This is equally true of the case before us, for even if the circumstances may have justified liberal treatment, that can not be permitted to influence our decision. It belongs to another department of the Government to extend such amelioration as appears to be demanded in particular instances.

Neither the case of *Les Cinq Frères*, 4 Lebau's Nouveau Code des Prises, 63, nor that of *The Maria*, 6 C. Rob. 201, cited by counsel, is in point. In the former, the Committee of Public Safety in the year three of the French calendar of the Revolution decreed the condemnation of Les Cinq Frères as an enemy's vessel, and of her cargo although belonging to Frenchmen, but further decreed restitution of the cargo or its value, as matter of grace, in considera-

Les Cinq Frères.

tion of services rendered by the claimants in furnishing provisions to the Republic, adding that this should not be drawn into a precedent. The latter simply involved the interpretation of an indulgence specifically granted by the British Government.

Colorable transfer is ground for condemnation.

Thus far we have proceeded on the assumption that the transfer of the Benito Estenger was merely colorable, and this, if so, furnished in itself ground for condemnation. A brief examination of the evidence, in the light of well-settled principles, will show that the assumption is correct.

Messa's story of the transfer was that the steamer had been owned by Gallego, Messa and Company, and then by himself; that he was compelled to sell in order to get money to live on; that he made the sale for $40,000, for which, or a large amount of which, credit was given on an indebtedness of Messa to Beattie and Company, and that he was employed by Beattie to go on the vessel as his representative and business manager.

It appeared that Beattie applied to the customs and shipping office in Jamaica for a British register, lodged with him the bill of sale, and made a declaration of ownership before him as registrar of shipping, which documents were filed on June 9 and 14 respectively, and were in conformity with the requirements of British law. The depositions of the ship broker and his employés put the price at nine thousand pounds, and showed their belief that the sale was *bona fide*, founded on what passed between Messa and Beattie. They did not know what arrangements were made for the payment of the price or how or in what shape the purchase money was paid. The accountant stated that after the sale Beattie went on board and took possession of the vessel, and informed the officers in charge that he had become the owner, gave orders regarding her, and informed witness that he had given Messa the position as supercargo.

Messa remained on board as supercargo after transfer.

There was considerable confusion on the point as to who was master of the vessel after the transfer. Perez testified that he was, and as master he interposed the claim on behalf of Beattie. He also swore that Mr. Beattie "informed him that he could remain as master, but it would be necessary for him to put an English subject on board as first officer or second captain, in conformity with the British law." Cole, a British subject, asserted that he was master, and Beattie stated that he appointed him such with Perez as mate and pilot, while Messa said that Perez

Conflicting evidence as to who was master after the transfer.

was master and that he, Messa, was supercargo. Perez had been the captain of the ship and remained on her, and conceding that Cole was placed on board in the capacity of captain, the inference is not unreasonable that this was for appearances only.

Beattie testified that he was a member of the firm of Beattie and Company, composed of himself and his brothers, all British subjects, and interested in lands, sugar estates, mines and forests in the district of Manzanillo; that he had resided there for some years, returning to his parents' home in England for several months at a time; that he concluded the purchase of the Benito Estenger from Messa on June 9, 1898; that she left Jamaica on her last voyage on June 23, bound for Manzanillo, and chartered by Flouriache, a Cuban merchant, carrying a cargo of foodstuffs sent for the purpose of trade; that he bought the vessel for nine thousand pounds; but he declined to state of what the payment or payments of the purchase money consisted, although saying that the sale was *bona fide*.

The consul testified that claimant, in conversation, while insisting that the transfer was absolute, admitted that it was effected for the purpose of protecting the vessel.

Résumé of evidence regarding transfer.

In short, the statements as to price were conflicting; the reason assigned for the sale was to get money to live on, and yet apparently no money passed, and Messa said that he received credit for a large part of the consideration on indebtedness to claimant's firm; claimant himself refused to describe the payment or payments; the Spanish master and crew remained in charge; Messa went on the voyage as supercargo; the vessel continued in trade, which, in this instance at least, appeared to be plainly trade with the enemy; and, finally, it is said by claimant's counsel in his printed brief: "It will not be contended upon this appeal that all the interest of Mr. Messa in the Benito Estenger ceased on June 9, 1898. The transfer was obviously made to protect the steamer as neutral property from Spanish seizure. That Mr. Messa, however, still retained a beneficial interest after this sale and transfer of flags, and continued to act for the vessel as supercargo, has not been disputed."

The attempt to break the force of this admission by the contention that the change of flag was justifiable as made to avoid capture by the Spanish is no more than a reiteration of the argument that Messa was a Cuban rebel, and his

vessel a Cuban vessel, which, as has been seen, we have been unable to concur in. If the transfer were invalid, she belonged to a Spanish subject, she was engaged in an illegal venture, and her owner can not plead his fear of Spanish aggression.

Hall on conditions of validity of transfer of vessels *flagrante bello*.

Transfers of vessels *flagrante bello* were originally held invalid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France "their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war;" says: "in England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." International Law, (4th ed.) 525. And to the same effect is Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts, (Pratt's ed.) 63; 2 Wheat. App. 30: "In respect to the transfers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim; . . . and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether."

Story on the same question.

The Sechs Geschwistern.

The Sechs Geschwistern, 4 C. Rob. 100, is cited, in which Sir William Scott said: "This is the case of a ship, asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of France, it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred, must be *bona fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that

anything tending to continue his interest, vitiates a contract of this description altogether."

The Jemmy. In *The Jemmy*, 4 C. Rob. 31, the same eminent jurist observed: "This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which if the court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, and under the management of her former owner. Wherever that fact appears, the court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong, that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the court to protect itself against frauds."

The Omnibus. And in *The Omnibus*, 6 C. Rob. 71, he said: "The court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction."

The Island Belle. The rule was stated by Judge Cadwalader of the Eastern District of Pennsylvania thus: "The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no such change of property is recognized where the disposition and control of a vessel continue in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile." *The Island Belle*, 13 Fed. Cases, 168.

The Baltica. So in *The Baltica*, Spinks Prize Cases, 264, several vessels had been sold by a father, an enemy, to his son, a neutral, immediately before the war, and only paid for in part, the remainder to be paid out of the future earnings thereof, and the Baltica, which was one of them, was condemned on the ground of a continuance of the enemy's interest.

The Soglasie. In *The Soglasie*, Spinks Prize Cases, 104, Dr. Lushington held the *onus probandi* to be upon the claimant, and made these observations: "With regard to documents of

a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extraordinary facility. What the court especially desires is, that testimony which bears less the appearance of formality,—evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the court looks for that correspondence and other evidence which naturally attends the transaction, accompanies it, or follows it, and which, when it bears upon the face of it the aspect of sincerity, will always receive its due weight."

The Ernst Merck. In *The Ernst Merck*, Spinks Prize Cases, 98, the sale was to neutrals of Mecklenburg shortly before the breaking out of war, and it was ruled that the onus of giving satisfactory proof of the sale was on the claimant, and without it the court could not restore even though it was not called on to pronounce affirmatively that the transfer was fictitious and fraudulent. In that case the vessel was condemned partly because of absence of proof of payment, Dr. Lushington saying: "We all know that one of the most important matters to be established by a claimant is undoubted proof of payment."

To the point that the burden of proof was on the claimant see also *The Jenny*, 5 Wall. 183; *The Amiable Isabella*, 6 Wheat. 1; *The Lilla*, 2 Cliff. 169; Story's Prize Courts, 26.

Judgment. We think that the requirements of the law of prize were not satisfied by the proofs in regard to this transfer, and on all the evidence are of opinion that the court below was right in the conclusion at which it arrived.

Decree affirmed.

Mr. Justice Shiras, Mr. Justice White and Mr. Justice Peckham dissented.

Case of the Carlos F. Roses.

(Vol. 177, United States Reports, p. 655. Decided May 14, 1900. Mr. Chief Justice Fuller delivered the opinion of the court.)

Statement of the case. The Carlos F. Roses was a Spanish bark of 499 tons, hailing from Barcelona, Spain, sailing under the Spanish flag, and officered and manned by Spaniards. She had been owned for many years by Pedro Roses Valenti, a citizen of Barcelona. Her last voyage began at Barcelona,

Statement of the case.

whence she proceeded to Montevideo, Uruguay, with a cargo of wine and salt. All of the outward cargo was discharged at Montevideo, where the vessel took on a cargo of jerked beef and garlic to be delivered at Havana, Cuba, and sailed for the latter port on March 16, 1898. On May 17, when in the Bahama Channel off Punta de Maternillos, Cuba, and on her course to Havana, she was captured by the United States cruiser New York and sent to Key West in charge of a prize crew. The bark and her cargo were duly libelled May 20. All of the ship's papers were delivered to the prize commissioners, and the deposition of Maristany, her master, was taken *in preparatorio*. Kleinwort Sons and Company of London, England, made claim to the cargo, consisting of a shipment of 110,256 kilos of jerked beef and 19,980 strings of garlic, and a further shipment of 165,384 kilos of jerked beef, alleging that they were its owners and that it was not lawful prize of war. In support of the claim the firm's agent in the United States filed a test affidavit made on information and belief. In this it was alleged that Kleinwort Sons and Company were merchants in London; that the members of the firm were subjects of the United Kingdom of Great Britain and Ireland; that in February and March, 1898, the bark, being then in Montevideo, bound on a voyage to Havana, took on board a cargo of jerked beef and strings of garlic shipped by Pla Gibernau and Company, merchants of Montevideo, to be transported to the port of Havana, and there to be delivered to the order of the shippers according to the condition of certain bills of lading issued therefor by the bark to Pla Gibernau and Company; that the members of the firm of Gibernau and Company were citizens of the Argentine Republic; that the bark left Montevideo on March 16, and proceeded on her voyage to Havana, until May 17, when, being at a point in the Bahama Channel off Martinique, she was captured by the United States cruiser New York, without resistance on her part, and sent into Key West as prize of war. That after the shipment of the cargo in Montevideo claimants made advances to the shippers and owners of the cargo in the sum of £6297, British sterling, to wit, £2714 item thereof, upon the security of said lot of 110,256 kilos of jerked beef and 19,980 strings of garlic, and £3583 item thereof, upon the security of said lot of 165,384 kilos of jerked beef; that at the time of making said advances and in consideration thereof, bills of lading covering the ship-

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ments were delivered to claimants duly indorsed in blank with the intent and purpose that they should thereby take title to said bills of lading, and to said shipments of jerked beef and garlic, and should, on the arrival of the vessel at her destination, take delivery of the shipments and hold the same as security for their said advances until paid, and with the right to dispose of said shipments and to apply the proceeds to the payment of their said advances; and accordingly the said Kleinwort Sons and Company did become and ever since have been and still are as aforesaid the true and lawful owners of the said bills of lading and of the shipments of jerked beef and garlic therein referred to. The affidavits further stated that the advances were equivalent in money of the United States to about $30,644.35, and that no part of the same had been paid, or otherwise secured to be paid.

The cause was heard on the libel and claims of the master of the bark and Kleinwort and Company, and the evidence taken *in preparatorio*. The vessel was condemned as enemy property, and the court ordered the claimants of the cargo to "have sixty days in which to file further proof of ownership;" and because of its perishable nature the marshal of the court was ordered to advertise and sell the same, and deposit the proceeds in accordance to law. No appeal was taken on behalf of the vessel. The cargo was sold and the proceeds deposited with the assistant treasurer of the United States at New York, subject to the order of the court. The time for claimants to take further proofs was twice extended. No witnesses were produced by claimants, but Charles F. Harcke, claimants' manager in London, made three *ex parte* affidavits before the United States consul general, which were offered in evidence by claimants. Appended to the affidavits were a large number of exhibits purporting to be papers, or copies of papers, relating to the shipment of the cargo, and some of the financial transactions of some of those who had to do with it. From these affidavits and papers it appeared that the voyage of the Carlos F. Roses was a joint venture entered into by Pedro Pagés of Havana, a Spanish subject; the Spanish owners of the vessel, and Gibernau and Company. The whole cargo was made up of two shipments, one of jerked beef and one of garlic, which had been purchased by Gibernau and Company on commission, and by them delivered to the Carlos F. Roses "consigned to order for account and risk and by order of the parties noted" in the

invoices. The shipment of jerked beef containing 275,640 kilos in bulk was divided thus: 60%, 165,384 kilos, "to the expedition or voyage of the Carlos F. Roses;" 40%, 110,256 kilos, "to Mr. Pedro Pagés of Havana." The shipment of garlic was divided thus: 9990 strings, "account of Mr. Pedro Pagés," and 9990 strings for "account of" Gibernau and Company. Both invoices were signed by Gibernau and Company, and bore date March 11 and 12, 1898.

Harcke stated in one of his affidavits that: "The said cargo was ultimately destined for Don Pedro Pagés, of Havana, who in the ordinary course of business would by payment to or indemnification of Kleinwort Sons & Co. or their agents in that behalf take up the said bills of lading and thus be enabled thereon to take the goods. No payment whatever has been made to Messrs. Kleinwort Sons & Co., or their agents, on account of the payments made by them through the said advances by said Don Pedro Pagés, or by any person on his behalf, or otherwise, and the said Kleinwort Sons & Co. have been and are wholly unindemnified in respect of their said payments except so far as the proceeds of said cargo and the insurance thereon which as the owners of the said goods they have become entitled to collect, thereby subrogating to their own right to the extent of such payments the insurers of the said goods."

The ship's manifest appears to have been signed by Maristany, her master, at Montevideo, on March 15, 1898, and was *viséd* by the Spanish consul at that port the previous day. It described the ship's destination as Havana, and her cargo as made up of two lots of jerked beef containing 248,076 kilos and 29,970 kilos respectively, and one lot of garlic containing 19,980 strings, all shipped by Gibernau and Company, "to order." On March 14, Maristany issued three bills of lading, in which it was stated that the shipments were received from Gibernau and Company for transportation to Havana "for account and at the risk of whom it may concern;" one of the bills covering a shipment of 165,384 kilos of jerked beef; another of 110,256 kilos of jerked beef; and the third of 19,980 bunches of garlic.

March 15, Gibernau and Company drew this bill of exchange:

"No. 128. Montevideo, March 15, 1898. For £2714 13 8. Ninety days after sight you will please pay for this

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first of exchange (the second and third being unpaid), to the order of the London River Plate Bank, L'd, the sum of £2714 13 8, value received, which you will charge to the account of Pedro Pagés of Havana as per advice.

"PLA GIBERNAU & Co.

"To Messrs. Kleinwort Sons & Co., London."

On the same day Maristany drew this bill of exchange:

"No. 129. Montevideo, March 15, 1898. For £3583 11 6. Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of Pla Gibernau & Co. the sum of £3583 11 6, invoice value of jerked beef, per Carlos F. Roses, which you will charge to the account of P. Roses Valenti, of Barcelona, as per advice.

"YSIDRO BERTRAN MARISTANY.

"To Messrs. Kleinwort Sons & Co., London."

This was indorsed by Gibernau and Company.

Valenti was the managing owner of the Carlos F. Roses. Both bills of exchange passed through the London River Plate Bank, L't'd, at Montevideo. On April 6 they were accepted by Kleinwort Sons and Company, and on May 9 were paid under discount by that firm. Harcke alleged that at the time of the acceptance of these bills of exchange, bills of lading covering the shipments of the garlic, and the jerked beef shipped for account and by order of Pagés, indorsed in blank by Gibernau and Company, were delivered to claimants, as security for payment of the bills of exchange; and that thereafter the bill of lading covering the shipment of jerked beef made for the account and by the order of the Carlos F. Roses was delivered in like manner, but affiant did not state when. It was also alleged that on April 9 the bills of lading and invoices, covering the shipment of garlic and Pagés's share of the jerked beef were mailed by Kleinwort Sons and Company to Gelak and Company, bankers of Havana, to be held until the bills of exchange charged to the account of Pagés should be paid. Neither the instructions sent to Gelak and Company, nor a copy of them, were produced. Harcke further alleged that the bills of lading and the invoices covering the vessel's share of the shipment of jerked beef were retained by Kleinwort Sons and Company "pending the disposal of the said cargo." On May 17, the day of the capture, Kleinwort Sons and Company cabled Gelak and Company requesting them to return the bills of lading and invoices, which had been forwarded on April 9.

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June 9, Gelak and Company replied that the bills and invoices had not been received. On October 21 claimants produced these bills of lading, alleging that they had been received from Gelak and Company on October 18, and that neither Pagés, Gibernau and Company, nor the owners of the Carlos F. Roses had paid claimants anything for or on account of their acceptance and payment of the bills of exchange. The cause of the cargo was heard a second time on the claim, test affidavit, and Harcke's affidavits, and a decree was entered for the payment to claimants of the proceeds of sale: from which decree the United States took this appeal.

Opinion.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The President's proclamation of April 26, 1898, declared the policy of the Government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

The question is whether this cargo when captured was enemy property or not. The District Court held that both the title and right of possession were in these neutral claimants at the time of the capture, "as evidenced by the indorsed bills of lading and the paid bills of exchange," and, therefore, entered the decree in claimant's favor.

Cargo on enemy vessels is presumably enemy property.

As the vessel was an enemy vessel the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on claimants. *The London Packet*, 5 Wheat. 132; *The Sally Magee*, 3 Wall. 451; *The Benito Estenger*, 176 U. S. 568.

Further proofs on claimant's behalf were ordered to be furnished within sixty days from June 2; and the time was enlarged to August 31; and again to October 15. The proofs tendered were three affidavits of claimants' manager sworn to September 27, October 12 and October 21, 1898, respectively, with accompanying papers. Such *ex parte* statements, where further proofs have been ordered, though admitted without objection, are obviously open to criticism, but without pausing to comment on these in that aspect, we inquire whether they satisfy the requirements of the law of prize in respect of the establishment of the neutral character of this cargo under the circumstances.

Review of the circumstances bearing upon the ownership of the cargo.

Gibernau and Company were citizens of a neutral state; they were evidently commission merchants, and in each invoice a charge for their commission on the shipment appears. The invoices expressly provided that the goods were shipped "to order for account and risk and by order of the parties noted below." The consignees noted below in the invoice of the jerked beef were the owners of the vessel, "the expedition or voyage of the 'Carlos F. Roses'" and "Mr. Pedro Pagés of Havana," all Spanish subjects. The consignees of the garlic were "Mr. Pedro Pagés" and "the undersigned;" that is, Gibernau and Company. There were three sets of bills of lading issued by the master to Gibernau and Company. One covered the portion of the shipment of jerked beef made for the account of the vessel; another, the portion of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau and Company. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. The ship's manifest was signed under date March 15, and the destination of the cargo was stated thus: "Shipped by Pla Gibernau Co. To order." The *visé* of the consul of Spain, dated the day before, was: "Good for Havana, with a cargo of jerked beef and garlic." As the vessel had a share in the shipment of jerked beef, and the consignees were named in the invoices, which set forth that the shipments were made by their orders for their account and at their risk, it would appear that the manifest was erroneous, and this and the fact that the bills of lading stated that the goods were taken "for account of whom it may concern," should be especially noted, since the reasonable inference is that the consignees must have been known to the master. And it also should be observed that there was no charter party, which would have necessarily revealed the engagements of the vessel, but which naturally would not be entered into if the commercial venture was that of her owner. The general rule is that a consignor on delivering goods ordered, to a master of a ship, delivers them to him as the agent of the consignee so that the property in them is vested in the latter from the moment of such delivery, though the rule may be departed from by agreement or by a particular trade custom, whereby the goods are shipped as belonging to the consignor and on his account and risk. We think that on the face of the papers it must be concluded that when these goods were delivered to the

The manifest was erroneous, and there was no charter party.

vessel they became the property of the consignees named in the invoices. Hence the shipments of jerked beef must be regarded as owned by Pagés, or by him and the owners of the Carlos F. Roses. One half of the garlic belonged to Pagés, the remaining half was consigned to Gibernau and Company, and they did not claim, and have not claimed it, nor was it asserted that Gibernau and Company retained the ownership of any part of the cargo after its delivery to the vessel. Property so long unclaimed may be treated as in any view good prize. *The Adeline*, 9 Cranch, 244; *The Harrison*, 1 Wheat. 298. In fact, claimants admit that the whole cargo "was ultimately destined for Don Pedro Pagés of Havana." The bill of exchange drawn by Gibernau and Company named Kleinwort Sons and Company as acceptors, and directed them to charge the amount to the account of "Pedro Pagés of Havana as per advice." The bill drawn by Maristany also named Kleinwort Sons and Company as drawees, and directed them to charge the amount "to P. Roses Valenti of Barcelona as per advice." In neither of them was there any reference to the cargo, and, so far as appeared, the amounts were at once charged up to the persons named.

Property long unclaimed may be treated as good prize.

Harcke said that when the bills of exchange were accepted by Kleinwort Sons and Company bills of lading covering the shipment of 110,256 kilos of jerked beef and of the garlic were delivered to them in consideration of the acceptance of the draft for £2714 13 8, and that bills of lading for the 165,354 kilos of jerked beef were afterwards delivered in consideration of the acceptance of the draft for £3583 11 6. But the date of the latter delivery was not given, and it affirmatively appeared that whenever these bills of lading reached Kleinwort Sons and Company they were retained "pending the disposal of the cargo." Both drafts were accepted April 6, and the bills of lading for the 110,256 kilos of jerked beef and for the garlic were forwarded to Gelak and Company on April 9, but the bills for the 165,384 kilos of jerked beef, whenever received, never were. The instructions to Gelak and Company were not put in evidence, nor any of the correspondence with Valenti or Pagés. In June, Gelak and Company cabled that the bills sent to them had not been received; in September they turned up, but no information was afforded as to how they came into Gelak and Company's possession; and in October duplicates were also received by claimants from Gelak and Company, with, so far as disclosed, no

accompanying explanation. And Harcke's affidavits failed to set forth the relations, transactions or correspondence existing and passing between claimants and the enemy owners of the cargo. This, although, as Sir William Scott said in *The Magnus*, 1 C. Rob. 31, "the correspondence of the parties. the orders for purchase, and the mode of payment, would have been the points to which the court would have looked for satisfaction."

The affidavits alleged that the claimants were wholly unindemnified except by the proceeds of the cargo and the insurance thereon, by which the insurers were subrogated to their own rights, but did not state whether the insurance contemplated a war risk, or why the bills of lading for the larger portion of the beef were retained by claimants and not sent to the Havana agents, or whether they retained them upon instructions from the enemy owners; or whether they came to claimants from Spain; nor did anything appear in respect of the interest of Pagés as consignee for himself, or in a representative capacity; nor of Valenti, the owner of the enemy vessel, who resided at Barcelona. The evidence of enemy interest arising on the face of the documents called on the asserted neutral owners to prove beyond question their right and title. And still for all that appears, the documents may have been sent merely to facilitate delivery to the agent of the enemy owners.

Bills of lading are only *quasi* negotiable.

Bills of lading stand as the substitute and representative of the goods described therein, and while *quasi* negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferror's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it. *Pollard* v. *Vinton*, 105 U. S. 7; *Shaw* v. *Railroad Company*, 101 U. S. 557.

Generally speaking, in the purchase and shipment of goods on bills of lading attached to bills of exchange drawn against them, the bill of exchange is drawn on the

consignee and purchaser, and sent forward for collection through the banker at the place of shipment, who advances on the draft, and thereafter realizes on it through his correspondents, or by sale as exchange; or the banker at some other point, or at the general exchange center, may be the drawee of the bill of exchange instead of the consignee or real owner, the banker standing in the place of the owner, in virtue of some arrangement with his customer, or on the faith of a running account, the pledge of other securities, or the customer's personal liability, so that the draft may be charged up at once, and, at all events, the control of the goods is not the sole reliance of the banker.

In the case in hand, the captors succeeded to the enemy owners' rights, and could have introduced evidence as to the real nature of the transactions, and so have rebutted any presumption in favor of the bankers as purchasers for value, and although they did not do this, the question still remains that in prize courts it is necessary for claimants to show the absence of anything to impeach the transaction, and at least to disclose fully all the surrounding circumstances. And this we think claimants have failed to do.

Secret liens do not affect right of capture.

The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading. The assignment of bills of lading transfers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem*, implies the absolute dominion—the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. Sand. Inst. Just., Introd., xlviii; 2 Marcadé, Expl. du Code Napoléon, 350; 2 Bouvier, (Rawle's Revision,) 73; *The Young Mechanic*, 2 Curtis, 404.

Claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior.

The Frances.

In *The Frances*, 8 Cranch, 418, a New York merchant claimed two shipments of goods, one in consequence of an advance made to enemy shippers by him in consideration of the consignment, and the other in virtue of a general balance of account due to him from the shippers as their factor. Both consignments were at the risk of the enemy

shippers. The goods were condemned as enemy property, and the sentence was affirmed. This court said:

The Supreme Court on the doctrine of liens in prize courts.

"The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. . . . But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . . But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. . . . The principal strength of the argument in favor of the claimant in this case, seemed to be rested upon the position, that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs."

The Mary and Susan.

In *The Mary and Susan*, 1 Wheat. 25, an American merchantman bound from Liverpool to New York was captured by a privateer of the United States during the war of 1812. In her cargo were certain goods which had been

shipped by British subjects to citizens of the United States, in pursuance of orders received before the declaration of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees. and stating the goods to be then the property of the bankers, and it was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

The Hampton.

In *The Hampton*, 5 Wall. 372, the schooner Hampton and her cargo had been captured, libelled and condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did anyone claim the cargo. One Brinckley appeared and claimed the vessel as mortgagee. The *bona fides* of this mortgage was not disputed; nor that he was a loyal citizen. But his claim was dismissed, and, the case having been certified to this court, it was held that in proceedings in prize, and under the principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens subject to be overridden by the capture. Mr. Justice Miller said:

"The ground on which appellant relies is, that the mortgage, being a *jus in re* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as equity courts treat them, as a mere security for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end

Mortgages on vessels captured *jure belli* are no more than liens subject to be overridden by capture.

of all prize condemnation. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bona fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his hands already. The mortgagee having an honest mortgage which he could establish in a court of prize, would either have the property restored to him or get the amount of the mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break the blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. The principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all danger to parties disposed to break them, can not be recognized as a rule of prize courts."

The Battle.

In *The Battle*, 6 Wall. 498, the steamer Battle and cargo were captured on the high seas as prize of war, brought into court and condemned, for breach of blockade and also as enemy property. Two claims were set up against the steamer in the court below, one for supplies, and another for materials, furnished, and for work and labor in building a cabin on the boat. These claims were dismissed, and the decree affirmed by this court, Mr. Justice Nelson delivering the opinion, saying: "The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination."

Such is the rule in the British prize courts. *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, Spinks Prize Cases, 26.

The Tobago.

The Tobago was a case of claim to a captured French vessel, made on behalf of a British merchant as the holder of a bottomry bond executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. Sir William Scott said:

"The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infring-

ing the rights of war, to relieve a ship in distress. . . . But can the court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in a court of prize? . . . The person advancing money on bonds of this nature, acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court of justice. . . . But it is said that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. . . . But it is a proposition of a much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is, therefore, unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. . . . I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize courts."

The Marianna.

In *The Marianna*, the vessel had been sold at Buenos Ayres by American owners to a Spanish merchant; the purchase money, however, had not been paid in full, but was to be satisfied out of the proceeds of a quantity of tallow on board the vessel for sale, consigned to the agents of the American vendors at London. The vessel was seized on her voyage to England, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. The former American proprietors made claim to the cargo, but the claim was disallowed because

the claimants' interest was not sufficient to support it; and the court said:

"Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much upon the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. . . . As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it can not be held to work any change in the property."

The Ida.

These cases were cited by Dr. Lushington in *The Ida* as settling the law. In that case, claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances, as security for payment of which bills of lading covering the cargo had been delivered to him. But the court declined to recognize the lien, and condemned the cargo as enemy property. Dr. Lushington referred to *The San Jose Indiano and Cargo* 2 Gallison, 267, and subscribed to

what was there said by Mr. Justice Story, but thought his remarks inapplicable to the case in hand.

The case referred to was affirmed by this court. 1 Wheat. 208. Goods were shipped by Dyson, Brothers and Company of Liverpool on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed: "Consigned to Messrs. Dyson, Brothers, and Finnie, by order and for account of J. Lizaur." In a letter accompanying the bill of lading and invoice, Dyson, Brothers and Company wrote Dyson, Brothers, and Finnie: "For Mr. Lizaur we open an account in our books here, and debit him, etc. We cannot yet ascertain the proceeds of his hides, etc., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." The two houses consisted of the same persons. It was held that the goods were, during their transit, the property and at the risk of the enemy shippers, and therefore subject to condemnation. Lizaur's claim was rejected, although Dyson, Brothers and Company had the proceeds of his hides in their hands.

The Lynchburg

The Lynchburg, Blatchford's Prize Cases, 57, and *The Amy Warwick*, 2 Sprague, 150, are cited on behalf of claimants, but, as we read them, they do not sustain their contention. The schooner Lynchburg with a cargo of coffee had been libelled during the civil war as enemy property, and also for an attempt to violate blockade. Brown Brothers and Company, loyal citizens, intervened as claimants of 2045 bags of coffee, part of the cargo. They alleged that they had made an advance of credit to Maxwell, Wright and Company, neutral merchants of Rio de Janeiro, for the purchase of the coffee, under which credit Maxwell, Wright and Company drew drafts on Brown Brothers and Company for £6000, on the condition expressed therein that the coffee purchased by claimants should be held until their advances were reimbursed thereon. It was admitted by the United States attorney that 1541 bags of the coffee should be released to Brown Brothers and Company, and that was done. As to the remaining 504 bags embraced in the general claim of Brown Brothers and Company, in which Wortham and Company of Virginia, asserted an interest, it was held by the court that as no proof was given by claimants that the value of the 1541

bags restored to them was not equivalent to the sum of their advances used in purchasing the whole 2045 bags, the reasonable presumption was that the restoration satisfied the entire advance. And Judge Betts said: "The claim to an absolute ownership of the 2045 bags was placed before the court in the oral argument, and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law, that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. *The Frances*, 8 Cranch, 418; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24. Here, the vessel was an enemy bottom; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port, and, on the surrender of the principal portion of the consignment to the claimants, no other evidence was given in establishing the facts that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading." The 504 bags were condemned, "because, by intendment of law, that portion belonged to Wortham and Company, and was not shown by the proofs to be exempt from capture as prize."

The Amy Warwick.

In *The Amy Warwick*, J. L. Phipps and Company of New York, British subjects, purchased 4700 bags of coffee, part of the cargo of an enemy vessel, which they had purchased through Phipps Brothers and Co., their firm at Rio, with funds of an enemy firm, and £2000 of their own money by draft on Phipps and Co., their firm at Liverpool. They took from the master a bill of lading which stated that Phipps Brothers and Company were the shippers of this coffee, and that it was to be delivered to their order. Indorsed on the bill of lading was a statement declaring that a portion of the coffee was the property of British subjects. Phipps Brothers and Company indorsed the bill of lading over to J. L. Phipps and Co. They also delivered to the master another part of the bill of lading, an invoice of the coffee, and a letter of advice to be conveyed to the firm in New York. The letter stated that the coffee was shipped for account of mer-

chants at Richmond, Virginia, and that a bill of lading would have been sent to them had it not been deemed advisable by reason of the unsettled state of political affairs, for the better protection of the property, and to prevent privateers from molesting the vessel, to have it certified on the bill of lading that a portion of the coffee was British property, and that this referred to the portion against which they had valued on Liverpool. It was held that the facts led plainly to the conclusion that claimants ought to be repaid the amount they had expended from their own funds in the purchase of the coffee and that the residue of the proceeds should be condemned. It was said that as the coffee was purchased at Rio by the claimants, and shipped by them on board the vessel under a bill of lading by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps and Co., that is, to themselves, they were the legal owners of the property, and could hardly be said to have a lien upon it. Their real character was that of trustees holding the legal title and possession with a right of retention until their advances should be paid. The doctrine of liens was considered, and *The Frances*, *The Tobago*, *The Marianna* and other cases examined. Judge Sprague was of opinion that the rule in such cases ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest, "for, if the court were never to look beyond the legal title, the result would be that when such title is held by an enemy in trust for a neutral, the latter loses his whole property; but, when the legal title is in a neutral in trust for an enemy, the property is restored to the neutral, not for his benefit, but merely as a conduit through which it is to be conveyed to the enemy. To refuse to look beyond the legal title is to close our eyes for the benefit of the enemy. It would enable him always to protect his property by simply putting it in the name of a neutral trustee."

Prize courts must look beyond legal title to the real beneficial interest.

We agree with counsel for the United States that notwithstanding the indorsement of Gibernau and Company on the bills of lading, the proof of a neutral title was not sufficient. Even if when the neutral interest is adequately proven to be *bona fide*, the claim of the captors may be required to yield, yet in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt, and the assignment as a cover to an enemy interest.

Proof of neutral title insufficient in this case.

Something was said in argument in relation to the character of the cargo. It is true that by the modern law of nations, provisions, while not generally deemed contraband, may become so, although belonging to a neutral, on account of the particular situation of the war, or on account of their destination, as, if destined for military use, for the army or navy of the enemy, or ports of naval or military equipment. *The Benito Estenger*, 176 U. S. 568; *The Panama*, 176 U. S. 535; *The Peterhoff*, 5 Wall. 28; Grotius De Jure Belli et Pacis, lib. III, c. 1, § 5; Hall, § 236.

Doubtless, in this instance, the concentration and accumulation of provisions at Havana might fairly be considered a necessary part of Spanish military operations, *imminente bello*, and these particular provisions were perhaps especially appropriate for Spanish military use; but while these features may well enough be adverted to in connection with all the other facts and circumstances, we do not place our decision upon them.

Judgment.

We are of opinion that a valid transfer of title to this enemy property to claimants was not satisfactorily made out, and that

The decree below must be reversed, and a decree of condemnation directed to be entered, and it is so ordered.

Mr. Justice Shiras, with whom concurred Mr. Justice Brewer, dissenting.

* * * * * * *

TITLE BY PRESCRIPTION.

Article IV of the Treaty of Arbitration between Great Britain and Venezuela, which was ratified on June 14, 1897, contains the following rules, which are remarkable for limiting the necessary occupation in country claimed by one sovereignty or the other to a period of fifty years:

In deciding the matters submitted the arbitrators shall ascertain all the facts which they deem necessary to a decision of the controversy and shall be governed by the following rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the arbitrators shall determine to be applicable to the case.

RULES.

(*a*) Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

(*b*) The arbitrators may recognize and give effect to rights and claims resting on any other ground whatever, valid according to international law, and on any principles of international law which the arbitrators may deem to be applicable to the case and which are not in contravention of the foregoing rule.

(*c*) In determining the boundary line, if territory of one party be found by the tribunal to have been at the date of this treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the tribunal, require.

These rules had been embodied in a proposed treaty of arbitration which was agreed upon late in 1896 by the American Secretary of State, Mr. Olney, and the British Ambassador, Sir Julian Pauncefote, for the settlement of the Venezuelan boundary dis-

pute. They were not altogether satisfactory to Venezuela and were only accepted by her after considerable hesitation.

The Jurisdiction of the United States over the Bering Sea.

(Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration, vol. 1, p. 75.)

The following is the principal part of the award of the Tribunal of Arbitration, made August 15, 1893, under the treaty of February 29, 1892, between the United States and Great Britain:

Preamble of award.

Whereas by a treaty between the United States of America and Great Britain, signed at Washington, February 29, 1892, the ratifications of which by the Governments of the two countries were exchanged at London on May the 7th, 1892, it was, amongst other things, agreed and concluded that the questions which had arisen between the Government of the United States of America and the Government of Her Britannic Majesty, concerning the jurisdictional rights of the United States in the waters of Bering's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters, should be submitted to a Tribunal of Arbitration, to be composed of seven Arbitrators, who should be appointed in the following manner—that is to say: Two should be named by the President of the United States; two should be named by Her Britannic Majesty; His Excellency the President of the French Republic should be jointly requested by the High Contracting Parties to name one; His Majesty the King of Italy should be so requested to name one; His Majesty the King of Sweden and Norway should be so requested to name one; the seven Arbitrators to be so named should be jurists of distinguished reputation in their respective countries, and the selecting Powers should be requested to choose, if possible, jurists who are acquainted with the English language;

Jurisdictional rights of United States and preservation of fur seals in Bering Sea.

And whereas it was further agreed by Article II of the said Treaty that the Arbitrators should meet at Paris

within twenty days after the delivery of the Counter-Cases mentioned in Article IV, and should proceed impartially and carefully to examine and decide the questions which had been or should be laid before them as in the said Treaty provided on the part of the Governments of the United States and of Her Britannic Majesty, respectively, and that all questions considered by the Tribunal, including the final decision, should be determined by a majority of the Arbitrators;

And whereas by Article VI of said Treaty, it was further provided as follows:

Points for separate decision.

In deciding the matters submitted to the said Arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to wit:

1. What exclusive jurisdiction in the sea now known as the Bering's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

3. Was the body of water now known as the Bering's Sea included in the phrase *Pacific Ocean*, as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Bering's Sea were held and exclusively exercised by Russia after said Treaty?

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering's Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th of March, 1867, pass unimpaired to the United States under that Treaty?

5. Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary three-mile limit?

And whereas, by Article VII of the said Treaty, it was further agreed as follows:

As to concurrent regulations.

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Bering Sea, the Arbitrators shall then determine what concurrent Regulations, outside the jurisdictional limits of the respective Governments, are necessary, and over what waters such regulations should extend;

The High Contracting Parties furthermore agree to cooperate in securing the adhesion of other Powers to such Regulations;

And whereas, by Article VIII of the said Treaty, after reciting that the High Contracting Parties had found themselves unable to agree upon a reference which should include the question of the liability of each for the injuries

alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, and that "they were solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions," the High Contracting Parties agreed that "either of them might submit to the Arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation;"

Personnel of tribunal.

And whereas the President of the United States of America named the Honorable John M. Harlan, Justice of the Supreme Court of the United States, and the Honorable John T. Morgan, Senator of the United States, to be two of the said Arbitrators, and Her Britannic Majesty named the Right Honorable Lord Hannen and the Honorable Sir John Thompson, minister of justice and attorney-general for Canada, to be two of the said Arbitrators, and His Excellency the President of the French Republic named the Baron de Courcel, Senator, Ambassador of France, to be one of the said Arbitrators, and His Majesty the King of Italy named the Marquis Emilio Visconti Venosta, former Minister of Foreign Affairs and Senator of the Kingdom of Italy, to be one of the said Arbitrators, and His Majesty the King of Sweden and Norway named Mr. Gregers Gram, minister of state, to be one of the said Arbitrators;

And whereas We, the said Arbitrators, so named and appointed, having taken upon ourselves the burden of the said Arbitration, and having duly met at Paris, proceeded impartially and carefully to examine and decide all the questions submitted to us, the said Arbitrators, under the said Treaty, or laid before us as provided in the said Treaty on the part of the Governments of Her Britannic Majesty and the United States, respectively;

Award.

Now We, the said Arbitrators, having impartially and carefully examined the said questions, do in like manner by this our Award decide and determine the said questions in manner following, that is to say, we decide and determine as to the five points mentioned in Article VI as to which our Award is to embrace a distinct decision upon each of them:

As to the first of the said five points, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers

Gram, being a majority of the said Arbitrators, do decide and determine as follows:

First point. By the Ukase of 1821 Russia claimed jurisdiction in the sea now known as the Bering's Sea to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that from that time up to the time of the cession of Alaska to the United States Russia never asserted in fact or exercised any exclusive jurisdiction in Bering's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.

Second point. As to the second of the said five points, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that Great Britain did not recognize or concede any claim, upon the part of Russia, to exclusive jurisdiction as to the seal fisheries in Bering Sea, outside of ordinary territorial waters.

Third point. As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the Bering Sea was included in the phrase "Pacific Ocean" as used in the Treaty of 1825, between Great Britain and Russia, We, the said Arbitrators, do unanimously decide and determine that the body of water now known as the Bering Sea was included in the phrase "Pacific Ocean" as used in the said Treaty.

And as to so much of the said third point as requires us to decide what rights, if any, in the Bering Sea were held and exclusively exercised by Russia after the said Treaty of 1825, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that no exclusive rights of jurisdiction in Bering Sea and no exclusive rights as to the seal fisheries therein were held or exercised by Russia outside of ordinary territorial waters after the Treaty of 1825.

Fourth point. As to the fourth of the said five points, We, the said Arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal

fisheries in Bering Sea, east of the water boundary, in the Treaty between the United States and Russia of the 30th of March, 1867, did pass unimpaired to the United States under the said Treaty.

Fifth point.

As to the fifth of said five points, We, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea, when such seals are found outside the ordinary three-mile limit.

Concurrent Regulations determined upon by Tribunal.

And whereas the aforesaid determination of the foregoing questions as to the exclusive jurisdiction of the United States mentioned in Article VI leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Bering Sea, the Tribunal having decided by a majority as to each Article of the following Regulations, We, the said Baron de Courcel, Lord Hannen, Marquis Visconti Venosta, and Mr. Gregers Gram, assenting to the whole of the nine Articles of the following Regulations, and being a majority of the said Arbitrators, do decide and determine, in the mode provided by the Treaty, that the following concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary and that they should extend over the waters hereinafter mentioned; that is to say:

ARTICLE 1.

The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture, or pursue, at any time and in any manner whatever, the animals commonly called fur seals, within a zone of sixty miles around the Pribilof Islands, inclusive of the territorial waters.

The miles mentioned in the preceding paragraph are geographical miles of sixty to a degree of latitude.

ARTICLE 2.

The two Governments shall forbid their citizens and subjects respectively to kill, capture, or pursue, in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive,

the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Bering Sea, which is situated to the north of the 35th degree of North latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article 1 of the Treaty of 1867 between the United States and Russia, and following that line up to Bering Straits. Concurrent Regulations determined upon by Tribunal.

ARTICLE 3.

During the period of time and in the waters in which the fur seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will, however, be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing boats.

ARTICLE 4.

Each sailing vessel authorized to fish for fur seals must be provided with a special license issued for that purpose by its Government and shall be required to carry a distinguishing flag to be prescribed by its Government.

ARTICLE 5.

The masters of the vessels engaged in fur seal fishing shall enter accurately in their official log book the date and place of each fur seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

ARTICLE 6.

The use of nets, firearms, and explosives shall be forbidden in the fur seal fishing. This restriction shall not apply to shotguns when such fishing takes place outside of Bering's Sea, during the season when it may be lawfully carried on.

ARTICLE 7.

The two Governments shall take measures to control the fitness of the men authorized to engage in fur seal fishing; these men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

ARTICLE 8.

Concurrent Regulations determined upon by Tribunal.

The regulations contained in the preceding articles shall not apply to Indians dwelling on the coast of the territory of the United States or of Great Britain and carrying on fur seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars, or sails, and manned by not more than five persons each, in the way hitherto practiced by the Indians, provided such Indians are not in the employment of other persons, and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person.

This exception shall not be construed to affect the municipal law of either country, nor shall it extend to the waters of Bering Sea or the waters of the Aleutian Passes.

Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur sealing vessels as heretofore.

ARTICLE 9.

The concurrent regulations hereby determined with a view to the protection and preservation of the fur seals shall remain in force until they have been, in whole or in part, abolished or modified by common agreement between the Governments of the United States and of Great Britain.

The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

* * * * * * *

And whereas each and every question which has been considered by the Tribunal has been determined by a majority of all the Arbitrators;

Now, We, Baron de Courcel, Lord Hannen, Mr. Justice Harlan, Sir John Thompson, Senator Morgan, the Marquis Visconti Venosta, and Mr. Gregers Gram, the respective minorities not withdrawing their votes, do declare this to be the final Decision and Award in writing of this Tribunal in accordance with the Treaty.

Made in duplicate at Paris and signed by us the fifteenth day of August, in the year 1893.

And We do certify this English Version thereof to be true and accurate.

ALPH. DE COURCEL.
JOHN M. HARLAN.
JOHN T. MORGAN.
HANNEN.
JNO. S. D. THOMPSON.
VISCONTI VENOSTA.
G. GRAM.

RIGHTS OF CITIZENS OF THE UNITED STATES IN FOREIGN COUNTRIES.

ILLEGAL IMPRISONMENT.

(Opinions of Attorney-General U. S., Vol. XXII, p. 32, etc.)

The following extract is from an opinion of the Attorney-General of the United States, in which it is held that the imprisonment of a United States citizen by a foreign official because of alleged disrespect of that official's authority, and without judicial process or allegation of a violation of law, is such an injury as to render that official's government liable in damages:

On January 4, 1886, a citizen of the United States, Mr. Thomas J. Culliton, the treasurer of the dredging company then doing work on the Isthmus of Panama, was arrested and imprisoned by the acting prefect of Colon without judicial process and without any allegation of a violation of law, but simply because Mr. Culliton's conduct was alleged by the prefect to be in disrespect of his authority. The United States consul at Colon and Admiral Jouett, who happened to be in port at that time, intervened, and Culliton was released by the order of the prefect after five hours' detention in the common jail.

The imprisonment of a citizen of the United States by an officer of a foreign government, without judicial process, or allegation of a violation of law, but because of an alleged disrespect of such official's authority, is such an injury as to render such government liable in damages.

The loss of time, the absence from business, the personal humiliation, the bodily and mental suffering, resulting

from wrongful arrest and imprisonment, are grounds for compensatory damages. The precise amount required to make the wrongful citizen whole is determined in a suit of law by a jury, and in this case must be fixed through negotiations.

Extraterritorial Rights in China.

as to municipality of Shanghai.

The following is a portion of a letter from Secretary Bayard to Mr. Denby, minister to China, dated March 7, 1887,[a] concerning the municipal ordinances of Shanghai, and the authority of the consul-general at that place to enforce them:

I have received your No. 240 of the 12th of November last, touching the projected revision of the municipal regulations and by-laws of Shanghai, and offering certain pertinent points for the consideration of the Department.

Shanghai municipal charter.

It appears that by the municipal charter of Shanghai every foreigner owning land of the value of at least 500 taels, or occupying a house of an assessed rental value of not less than 250 taels, is a member of what is called the "municipal body," and is entitled to vote at all municipal elections. The "municipal body" elect at stated times a municipal council, consisting of not more than nine members, who have the power to make regulations for the government of the municipality, subject to the approval of the consuls and foreign ministers, or a majority of them, and of the ratepayers at a special meeting.

Proposed revision of municipal regulations.

In the proposed revision it is insisted by the municipality, in respect to any by-law that may hereafter be passed, that "any such additional or substituted by-law, or alteration or repeal of a by-law, shall be binding when approved by the treaty consuls and the intendant of circuit, or by a majority of them; but the representatives of the treaty powers may, at any time within six months of the date of such approval, annul any such additional or substituted by-law, or alteration or repeal of by-law."

Your opinion as to this proposed ordinance is in entire accord with that of the Department, that it would reverse

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[a] Wharton's International Law Digest, second edition, vol. 3, Appendix, p. 852.

the proper order of things and be inexpedient to put in force, without the approval of the foreign ministers, a by-law which they might, in the exercise of an acknowledged power, subsequently disapprove and disallow. This would be in fact the substitution of a power of annulment for the power of veto which the foreign ministers now possess.

Consul-general's authority to enforce municipal ordinances.

The question which you suggest as to the authority of the consul-general at Shanghai to enforce the ordinances of the municipality against citizens of the United States is not without difficulty. Under section 4086 of the Revised Statutes of the United States, consuls of the United States in China are empowered to exercise criminal and civil jurisdiction in conformity with the laws of the United States. It is provided, however, that when those laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies the common law and the law of equity and admiralty shall be extended to the persons within the consul's jurisdiction; and if neither the common law nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate remedies the ministers in the countries, respectively, to which the statute applies shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

Under certain contingencies the minister may issue decrees and regulations having the force of law.

The last clause, in respect to decrees and regulations, has been construed by the Department to confer upon the ministers in question the power to regulate the course of procedure and the forms of judicial remedies rather than any general legislative power for the definition of offenses and the imposition of penalties for their commission. It is true that opinion has been divided on this point. Mr. Attorney-General Cushing held that the power given to the commissioner of the United States in China to make "decrees and regulations" which should have the force of law gave him the power to legislate in certain respects for citizens of the United States in China, and "to provide for many cases of criminality which neither Federal statutes nor the common law would cover." (7 Op., 504, 505.) The disposition, however, of this Department has been to restrict the legislative power of the minister to the regulation of forms and course of judicial procedure, it not being regarded as desirable or proper to authorize the exercise of so great a power, while it was so much in doubt, as that of criminal legislation.

Grounds for Shanghai municipal ordinances.

But the ordinances of the municipality of Shanghai, although dependent for their operation as to citizens of the United States upon the approval of the minister of this Government in China, are conceived to present in one aspect a different question from that of the power of the minister of the United States as to criminal legislation. The municipality of Shanghai is understood to have been organized by the voluntary action of the foreign residents of certain nationalities, or such of those residents as were owners or renters of land, for the purpose of exercising such local powers for the preservation of the order and morals of the community as are usually enjoyed by municipal bodies. In the United States, where government is reduced to a legal system, these powers of local police rest on charters granted by the supreme legislative authority of the State; but it is not difficult to conceive of a case in which a community outside of any general system of law might organize a government and adopt rules and regulations which would be recognized as valid on the ground of the right of self-preservation, which is inherent in people everywhere.

In this light may be regarded the municipal ordinances of Shanghai. The foreign settlement not being subject to the laws of China, and the legal systems of the respective foreign powers represented there being not only dissimilar *inter se*, but insufficient to meet the local needs, it became necessary for the local residents interested in the preservation of peace and order to supply the deficiency.

American citizens residing in Shanghai enjoy, in common with other persons composing the foreign settlement, all the rights, privileges, and protection which the municipal government affords; and as they go there voluntarily, and presumptively for the advancement of their personal interests, they may reasonably be held to observe such police regulations as are not inconsistent with their rights under the laws of the United States. It is true that this reasoning is not conclusive as to the strict legal authority of the consul-general of the United States to enforce such regulations; but, taken in connection with the fact that at present American citizens in Shanghai are not subject to any judicial control except that of the consul-general of the United States, it affords a basis upon which his enforcement of the municipal regulations may be justified.

Extensive jurisdiction of consuls in China.

It is important to observe that the jurisdiction of consuls of the United States in China is very extensive, in-

cluding not only the administration of the laws of the United States, and the law of equity and admiralty, but also the common law. The consular courts have, therefore, what the courts of the United States generally have not—common-law jurisdiction in criminal cases. It is true that this jurisdiction is difficult, indeed incapable, of exact definition, but it implies the power to enforce rules which are not to be found on the statute-book of the United States, and which can be ascertained only by the application of the general principles of the common law to special cases and condition. In respect to matters of local police, a fair measure and definition of the law may be found in the regulations adopted by the municipality in aid of and supplementary to the general juridical systems of the foreign powers. Such a process, while maintaining the peace and order of the community, tends to consolidate the local administration of law.

The Department is, however, of opinion that all difficulties would be removed if the treaty powers would adhere to the plan suggested in your dispatch of organizing a municipal court to administer the regulations of the municipal body. This course would be advantageous, both to the municipality and to the treaty powers. It would relieve the consular representatives of the latter from the performance of an embarrassing duty, and would secure a uniform and equal administration of the municipal laws.

Cooperation of Civilized Powers in Non-Christian and Semicivilized Countries.

EXTRACTS FROM BRITISH ADMIRALTY STATION ORDERS FOR CHINA.

Department of State,
Washington, December 19, 1894.

The Honorable The Secretary of the Navy.

Sir: I have the honor to inclose for your information a copy of a note of the 14th instant from the British ambassador at this capital, transmitting a copy of the instructions by which Her Majesty's naval commanders on the Chinese Station for the protection of Europeans at the treaty ports will be governed.

I have the honor to be, Sir,

Your obedient servant, W. Q. Gresham.

WASHINGTON, *December 14, 1894.*

SIR: With reference to Mr. Goschen's note of October 27 respecting joint action by the naval commanders on the China Station for the protection of Europeans at the treaty ports, I have the honor to forward to you herewith, at the request of the Earl of Kimberly, a copy of articles 396, 397, 405, 406, and 407 of the station orders for China, which are supplied to naval commanders of Her Majesty's ships.

The lords commissioners of the Amiralty propose, I am informed, to adhere to these instructions, as any further orders would, in their opinion fetter the discretion which in present circumstances it is desirable to give to the British naval commander-in-chief in China in settling with his colleagues the details of the arrangement which may be necessary for carrying out the object in view.

I have the honor, etc.,

JULIAN PAUNCEFOTE.

The HON. W. Q. GRESHAM.

ARTICLE 396.

As to landing parties.

Armed parties are not to be landed from Her Majesty's ships to escort consuls proceeding into the interior of the country, except under circumstances of pressing emergency.

2. They are not to be landed during a disturbance, or apprehended disturbance, unless at the written requisition of the consular officer at the port, who is to state explicitly in it:

(1) That the lives, or property, of British subjects are actually in danger from violence, which can not otherwise be controlled (vide article 421, Admiralty Instructions.)

(2) That the local authorities have declined, or are unable to afford the necessary protection.

(3) The number, nature, and arms of the force or mob against which the armed party is required to be landed, also the nature of the locality, or any other information that may enable officers commanding to judge whether the resources at their disposal are sufficient to meet the exigencies of the service required. (Observing that as a rule it is highly unadvisable to risk a reverse by landing a weak party, or allowing them to be entangled amongst the narrow streets, which are usually to be found in most of the towns out here.)

3. The party landed, however small, is to be commanded by a commissioned officer, and is to be kept intact, unless there is a second commissioned officer to command the

detached force. It is always to be remembered that "concentration means strength"—"dispersion weakness," with liability of being defeated in detail.

4. The officer commanding a landing party is invariably to be furnished with written orders laying down the general principles under which he is to act, and as far as possible the details.

5. The lords commissioners of the Admiralty will not sanction any departure from the rule laid down prohibiting naval officers from undertaking or carrying on operations at a distance from their ships, and whatever operation they may engage in, jointly with Chinese forces, must always be carried on under the limitations of civilized and Christian warfare.

Article 397.

Special object of, and the employment of, British naval force in Chinese waters.

The special purposes for which Her Majesty's ships of war are stationed in the ports of China and employed on the coasts are to protect the floating commerce of British subjects against the piratical attacks in Chinese waters, to support Her Majesty's consuls in maintaining order and discipline among the crews of British vessels in the respective ports, and, in cases of great emergency, to protect the lives and properties of British subjects if placed in peril by wanton attacks directed against them, either on the part of local authorities or by an uncontrolled popular movement.

2. As regards this last point, it must constantly be borne in mind that the interference of naval force, either on the representation of Her Majesty's consuls or on the part of naval officers acting on their own estimation of facts before them, will alone receive the subsequent approval of Her Majesty's Government when it is clearly shown that, without such interference, the lives and properties of British subjects would in all probability have been sacrificed; and even in such a case Her Majesty's Government will expect to learn that the alternative of receiving them on board ship, and so extricating them from threatened danger, was not available.

3. Beyond this the circumstances of the case must be of a very peculiar nature which would be held by Her Majesty's Government to justify a recourse to force.

4. Her Majesty's Government can not leave it with Her Majesty's consuls or naval officers to determine for themselves what redress or reparation for wrong done to Brit-

ish subjects is due, or by what means it should be enforced. They can not allow them to determine whether coercion is to be applied by blockade, by reprisals, by landing armed parties, or by acts of even a more hostile character. All such proceedings bear more or less the character of acts of war, and Her Majesty's Government can not delegate to Her Majesty's servants in foreign countries the power of involving their own country in war.

ARTICLE 405.

Cooperation.

There is no objection to officers complying with requisitions from the Chinese authorities for cooperation in obtaining reparation for British subjects for damage to their persons or properties, with the clear understanding that the operation is merely directed to redress the wrong done to British subjects, and not to the general assertion of Chinese authority over any class of persons who may, for whatever reason, be obnoxious to the local government.

Her Majesty's ministers have been instructed that "whenever British subjects have been plundered, or are likely to be exposed to maltreatment, or their property to be endangered, Her Majesty's consul in the district shall apply to the Chinese authorities for immediate protection; or, if the injury has been consummated before such protection has been afforded, for redress of wrongs sustained and protection against their renewal; and in the event of those authorities pleading inability to afford it with the means at their disposal, the consul shall offer the cooperation of Her Majesty's naval forces as far as they may be available for the special purpose and occasion, and, in case of necessity, may even propose that Her Majesty's naval forces should act alone if accompanied by a Chinese mandarin, whose presence would afford imperial sanction to an enterprise which, without it, would be inconsistent with the principles on which Her Majesty desires that the relations between the two countries should be conducted."

ARTICLE 406.

The particular attention of officers in command is directed to the following extract from a dispatch of Sir Rutherford Alcock, dated the 15th of March, 1869, to the Commander-in-Chief:

Naval force to act alone only in case of imminent danger.

It is obviously the desire of Her Majesty's Government to recognize the supreme authority of the Government at Peking over the provincial authorities and to discountenance all local efforts to arrive at the

settlement of differences by any measures of coercion or pressure brought to bear against the latter. They count upon the central Government exercising the necessary power for the redress of local grievances, and disapprove all actions of the consuls, on the spot, beyond the due representation of the causes of complaint. If they fail in obtaining redress by such means, their appeal then lies to Her Majesty's minister at Peking, and in no case to the naval force, except for the immediate protection of lives and property in imminent danger, and in default of that protection which the Chinese local authorities are bound by treaty to supply.

It is only under such circumstances, I conclude, that Her Majesty's Government would sanction any appeal on the part of Her Majesty's consuls for aid from the naval commanders, or approve of assistance being rendered.

Article 407.

The foregoing articles, Nos. 396, 397, 405, and 406, containing, as they do, explicit rules approved by Her Majesty's Government, are in a general way amply sufficient for the purpose for which they were framed, but in view of the apparently organized character of the outrages recently perpetrated in the Yang-tsze Valley at Wuhu, Wusueh, and other places, the following observations may be useful to officers suddenly brought face to face with an emergency of this nature.

2. It is the obvious duty of the Chinese Government to maintain order in the country, and the necessity for complying with this obligation can not be too strongly urged upon the local authorities at all ports where British subjects are established.

General procedure in case of threatened outbreaks.

3. The treaty ports at which Her Majesty's consuls reside necessarily require the first consideration, and the main object to be kept in view is that Her Majesty's consuls should employ all their influence in causing the taotai, or other local official in command at a place where disturbances are apprehended, to make proper arrangements to preserve order, and to prevent outrages being committed against the persons or property of British subjects, and in the event of such officials declaring themselves unable to preserve order, to secure their full authority and personal cooperation in any action to be taken by the crews of Her Majesty's ships.

4. The mode of procedure required from consuls in making requisition for armed assistance upon the captains of Her Majesty's ships is laid down in article 396.

5. Officers commanding Her Majesty's ships stationed for the protection of British residents at treaty ports are to take the earliest opportunity after their arrival to study

General procedure in case of threatened outbreaks.

the features of the concessions or settlements, with a view to arriving at a definite plan of action, should action unfortunately become unavoidable, and in concert with Her Majesty's consul should, before the occasion arises if possible, settle upon a course of procedure to be followed in case of necessity by all British subjects in the neighborhood.

6. The first consideration is necessarily the safety of women and children, and it is obvious that these should not be left in exposed places, especially at night, when any danger from the Chinese populace is apprehended.

7. In all the treaty ports, and in some others, are hulks lying off the bunds, and to these hulks the women and children should remove in good time before the occurrence of an outbreak. An armed boat's crew, or a very small number of men, could secure the safety of the people in these vessels on the connection with the shore being broken.

8. It is clear that small detachments of men can not be sent out to distant places, or to the back streets in Chinese towns, and missionaries and others in such localities should remove to the port before they have to risk their lives as well as the property which it may be their object to stand by.

9. The loss of property wantonly destroyed or plundered by Chinese mobs is recoverable by indemnity from the Chinese Government; it is needless to say the loss of life is not.

10. The consideration second in importance, therefore, should be the timely withdrawal of people from outlying exposed positions to some central rallying point on the water front, to be decided on according to strategic consideration—this would no doubt be in most cases the British consulate.

11. Third, the able-bodied men in the settlement should be required by the consul to organize themselves for the protection of the women and children, or, if in sufficient numbers, for general defense, and in this all possible assistance should be given them.

12. A rallying point—which should always be, if possible, covered by the ship of war—being decided upon, commanding officers would then be strictly right in giving all possible aid in its defense, as it is obvious that Her Majesty's consulates, or the dwellings of Her Majesty's subjects, must not be attacked by ruffianly mobs and the flag insulted under the guns of Her Majesty's ships.

13. Commanding officers will understand that while the last resort should be to force, if unhappily force becomes unavoidable, their action should be sharp and decisive, and a serious lesson should be given; but it is only requisite to consider the number of places in China where British subjects and other foreigners are more or less at the mercy of the Chinese populace to enable them to fully realize the necessity of forbearance within all reasonable limits in dealing with local disturbances, and the necessity for securing, if possible, the attendance of the local mandarins, should they be compelled to fire on a mob. General procedure in case of threatened outbreaks.

14. If missionaries or other persons, in the face of the threatened outbreak, find it necessary to close their establishments, the consuls will no doubt notify the fact to the local authorities and request them to place guards upon the premises and their official seal upon the doors.

15. During any extraordinary movement of the Chinese populace which appears to be directed against foreigners generally, humanity as well as a common interest demands that help should be freely extended to the citizens of other States in all cases when it can be afforded by Her Majesty's ships, as it will undoubtedly be rendered by the commanders of foreign ships of war to all British subjects who may be in need of that protection which they may be in a position to afford under like circumstances.

Injuries to Foreigners by Mob Violence.

CASES OF ITALIAN SUBJECTS IN NEW ORLEANS.

(United States Foreign Relations, 1891, pp. 682-685.)

In the following letter of the Secretary of State it is held that subjects of foreign governments must submit to treatment according to the laws of the country of domicile; that they are not entitled to special treatment or to methods of redress beyond those open to citizens of the country; and that they accept the laws and customs of the country where they take up residence.

Mr. Blaine to Marquis Imperiali.

DEPARTMENT OF STATE,
Washington, April 14, 1891.

Letter of Secretary of State.

SIR: I have the honor to acknowledge the receipt of your note dated Thursday, April 2, 1891. It contains a second telegram from the Marquis Rudini, a part of which I here quote:

> The Government of the King of Italy has asked nothing beyond the prompt institution of judicial proceedings through the regular channels. It would have been absurd to claim the punishment of the guilty parties without the warrant of a regular judgment. The Italian Government now repeats the same demand. Not until the Federal Government shall have explicitly declared that the aforesaid proceedings shall be promptly begun can the diplomatic incident be considered as closed.

This Government certainly had no desire whatever to change the meaning of the Marquis Rudini's telegram of March 24. It was delivered at the State Department by Baron Fava in person, written in his own hand, and expressed in the English language. The following is the full text of the telegram:

ROME, *March 24, 1891.*

ITALIAN MINISTER, *Washington:*

Our requests to the Federal Government are very simple. Some Italian subjects, acquitted by the American magistrates, have been murdered in prison while under the immediate protection of the authorities. *Our right, therefore, to demand and obtain the punishment of the murderers and an indemnity for the victims is unquestionable.* I wish to add that the public opinion in Italy is justly impatient, and, if concrete provisions were not at once taken, I should find myself in the painful necessity of showing openly our dissatisfaction by recalling the minister of His Majesty from a country where he is unable to obtain justice.

RUDINI.

The words underscored are precisely those which I quoted in my former note; and I am directed by the President to express the satisfaction of this Government with the very material qualification of the demand made by the Marquis Rudini on behalf of the Italian Government.

You quote in your note another part of the Marquis Rudini's telegram of April 2 in these words:

> Meanwhile His Majesty's Government takes note of the declaration whereby the Federal Government recognizes that an indemnity is due to the families of the victims in virtue of the treaty in force between the two countries.

Indemnity to foreigners wronged by violation of treaty rights.

If the Marquis Rudini will carefully examine my note of April 1, he will discover that I did not "recognize that an indemnity is due to the families of the victims in vir-

tue of the treaty in force between the two countries." What I did say was in answer to Baron Fava's assertion that the United States Government refused to take this demand for indemnity into consideration. I quote my reply:

> The United States, so far from refusing, has distinctly recognized the principle of indemnity to those Italian subjects *who may have been wronged by a violation of the rights secured to them under the treaty with the United States concluded February 26, 1871.*

The Marquis Rudini may be assured that the United States would recompense every Italian subject who might "be wronged by the violation of a treaty" to which the faith of the United States is pledged. But this assurance leaves unsettled the important question whether the treaty has been violated. Upon this point the President, with sufficient facts placed before him, has taken full time for decision. He now directs that certain considerations on the general subject be submitted to the judgment of the Italian Government.

Violence against property of Spanish consul and other Spanish subjects in 1851.

As a precedent of great value to the case under discussion, the President recalls the conclusion maintained by Mr. Webster in 1851, when he was Secretary of State under President Fillmore. In August of that year a mob in New Orleans demolished the building in which the office of the Spanish consul was located, and at the same time attacks were made upon coffeehouses and cigar shops kept by Spanish subjects. American citizens were involved in the losses, which, in the aggregate, were large. The supposed cause of the mob was the intelligence of the execution of 50 young Americans in Havana and the banishment to Spanish mines of nearly 200 citizens of the United States. The victims were all members of the abortive Lopez expedition.

In consequence of these depredations of the mob upon the property of the Spanish consul, as well as against the Spanish subjects, Don Calderon de la Barca, the minister of Spain, demanded indemnification for all the losses, both official and personal.

Indemnity due to consul.

Mr. Webster admitted that the Spanish consul was entitled to indemnity, and assured the Spanish minister if the injured consul, Mr. Laborde—

> shall return to his post, or any other consul for New Orleans shall be appointed by Her Catholic Majesty's Government, the officers of this Government resident in that city will be instructed to receive and treat him with courtesy and with a national salute to the flag of his ship, if he shall arrive in a Spanish vessel, as a demonstration of respect,

such as may signify to him and to his Government the sense entertained by the Government of the United States of the gross injustice done to his predecessor by a lawless mob, as well as the indignity and insult offered by it to a foreign State with which the United States are, and wish ever to remain, on terms of the most respectful and pacific intercourse.

Demand for indemnity for other Spanish subjects not acceded to.

But when pressed by the Spanish minister to afford indemnity to Spanish subjects injured by the mob in common with American citizens, Mr. Webster declined to accede to the demand, and gave his reasons as follows:

> This Government supposes that the rights of the Spanish consul, a public officer residing here under the protection of the United States Government, are quite different from those of the Spanish subjects who have come into the country to mingle with our own citizens and here to pursue their private business and objects. The former may claim special indemnity; the latter are entitled to such protection as is afforded to our own citizens. While, therefore, the losses of individuals, private Spanish subjects, are greatly to be regretted, yet it is understood that many American citizens suffered equal losses from the same cause; and these private individuals, subjects of her Catholic Majesty, coming voluntarily to reside in the United States, have certainly no cause of complaint if they are protected by the same laws and the same administration of law as native-born citizens of this country. They have, in fact, some advantages over citizens of the State in which they happen to be, inasmuch as they are enabled, until they become citizens themselves, to prosecute for any injuries done to their persons or property in the courts of the United States or the State courts, at their election.

Indemnity actually paid as an act of grace.

It is proper, however, to add that two years after Mr. Webster wrote the foregoing note Congress, in recognition of certain magnanimous conduct on the part of the Queen of Spain in pardons bestowed on Americans who had unjustifiably invaded the island of Cuba, enacted a joint resolution, approved by President Fillmore March 3, 1853, the last day of his term, indemnifying the Spanish consul and other Spanish subjects for the losses sustained in the New Orleans mob of 1851. The considerations upon which this resolution was passed were held not to contravene the original position of Mr. Webster, shared also by President Fillmore.

Judicial remedy open to Italian subjects.

The right to judicial remedy which Mr. Webster assured to the Spanish subjects is likewise assured to the Italian subjects. The right is specially guaranteed in the second section of the third article of the Constitution. And, as Mr. Webster points out, the resident alien has a privilege which is denied to the citizen. The widows and children of the citizens who lost their lives by mob violence may sue the leaders and members of the mob only in the courts of

the State of Louisiana, while the widows and children of the Italian subjects who suffered death have the right to sue each member of the mob, not only in the State courts, but also before the Federal tribunals for the district of Louisiana.

Provision is made in the revised civil code of Louisiana for redress of such grievances as the widows and children of the victims of the mob may plead. I quote:

ART. 2314. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive, in case of death, in favor of the minor children and widow of the deceased, or either of them, and, in default of these, in favor of the surviving father or mother, or either of them, for the space of one year from the death.

ART. 2316. Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

ART. 2324. He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable *in solido* with that person for the damage caused by such act.

Different characteristics of the mobs of 1851 and 1891.

The Government of the United States would feel justified in resting on the argument and conclusion of Mr. Webster if the mob of March 14, 1891, did not, in some of its characteristics, differ from the mob of 1851. But it is due to entire candor, due to this Government, and due to the Government of Italy to point out certain differences of which the Government of the United States is honorably bound to take notice. In the case of the mob of 1851 Mr. Webster asserts that "no personal injury was offered to anyone;" that "the police and other legal authorities did all that was possible to preserve the peace and arrest the rioters;" that "the mob acted in the heat of blood, and not in pursuance of any predetermined plan or purpose of injury or insult;" that "the mob was composed of irresponsible persons, the names of none of whom are known to the Government of the United States, nor, so far as the Government is informed, to its officers or agents in New Orleans."

As promptly as possible after the lamentable occurrence at New Orleans the President directed the Attorney-General to cause, through his Department, a full inquiry to be made into all the facts connected therewith, and solicited his opinion whether any criminal proceedings would lie under the Federal laws in the Federal courts against persons charged with the killing of Italian subjects. He has not yet received the official report. If it be found that a

prosecution can be maintained under the statutes of the United States, the case will be presented to the next grand jury according to the usual methods of criminal administration. But if it shall be found, as seems probable, that criminal proceedings can only be taken in the courts of Louisiana, the President can in this direction do no more than to urge upon the State officers the duty of promptly bringing the offenders to trial. This was done in his telegram to the governor of Louisiana as early as the 15th of March.

If it shall result that the case can be prosecuted only in the State courts of Louisiana, and the usual judicial investigation and procedure under the criminal law is not resorted to, it will then be the duty of the United States to consider whether some other form of redress may be asked. It is understood that the State grand jury is now investigating the affair, and, while it is possible that the jury may fail to present indictments, the United States can not assume that such will be the case.

United States does not insure lives or property of Italians by treaty.

The United States did not by the treaty with Italy become the insurer of the lives or property of Italian subjects resident within our territory. No government is able, however high its civilization, however vigilant its police supervision, however severe its criminal code, and however prompt and inflexible its criminal administration, to secure its own citizens against violence promoted by individual malice or by sudden popular tumult. The foreign resident must be content in such cases to share the same redress that is offered by the law to the citizen, and has no just cause of complaint or right to ask the interposition of his country if the courts are equally open to him for the redress of his injuries.

When indemnity may not, and when it may, justly be claimed.

The treaty in the first, second, third, and, notably, in the twenty-third articles, clearly limits the rights guarantied to the citizens of the contracting powers in the territory of each to equal treatment and to free access to the courts of justice. Foreign residents are not made a favored class. It is not believed that Italy would desire a more stringent construction of her duty under the treaty. Where the injury inflicted upon a foreign resident is not the act of the Government or of its officers, but of an individual or of a mob, it is believed that no claim for indemnity can justly be made, unless it shall be made to appear that the public authorities charged with the peace of the community have connived at the unlawful act, or,

having timely notice of the threatened danger, have been guilty of such gross negligence in taking the necessary precautions as to amount to connivance.

If, therefore, it should appear that among those killed by the mob at New Orleans there were some Italian subjects who were resident or domiciled in that city, agreeably to our treaty with Italy, and not in violation of our immigration laws, and who were abiding in the peace of the United States and obeying the laws thereof and of the State of Louisiana, and that the public officers charged with the duty of protecting life and property in that city connived at the work of the mob, or, upon proper notice or information of the threatened danger, failed to take any steps for the preservation of the public peace and afterwards to bring the guilty to trial, the President would, under such circumstances, feel that a case was established that should be submitted to the consideration of Congress with a view to the relief of the families of the Italian subjects who had lost their lives by lawless violence.

Accept, etc., JAMES G. BLAINE.

To conclude the diplomatic history of this case the following extracts are given from official records,[a] in which an indemnity was offered and accepted.

Mr. Blaine to Marquis Imperiali.

DEPARTMENT OF STATE,
Washington, April 12, 1892.

SIR: I congratulate you that the difficulty existing between the United States and Italy growing out of the lamentable massacre at New Orleans in March of last year is about to be terminated. The President, feeling that for such an injury there should be ample indemnity, instructs me to tender you 125,000 francs. The Italian Government will distribute this sum among the families of the victims.

While the injury was not inflicted directly by the United States, the President nevertheless feels that it is the solemn duty, as well as the great pleasure, of the National Government to pay a satisfactory indemnity. . . .

JAMES G. BLAINE.

[a] United States Foreign Relations, 1891, pp. 727, 728.

Marquis Imperiali accepted the sum in behalf of the Italian Government in a letter of the same date in which he says, in part:

> The King's Government does not hesitate to accept this indemnity without prejudice to the judicial steps which it may be proper for the parties to take, and, considering the redress obtained sufficient. . . .

CASE OF ANTONIO ABBAGNATO, AN ITALIAN SUBJECT.

(Vol. 62, Federal Reporter, p. 240. Case of *City of New Orleans* v. *Abbagnato*. Decided May 29, 1894.)

Statement of the case.

This action was brought by the mother of Antonio Abbagnato against the city of New Orleans for damages for the death of her son, who had been killed, with others, in March, 1891, by a mob which had broken into the parish jail without any adequate attempt at resistance on the part of the constituted authorities of the city. The victims had been tried before the criminal district court for the parish of New Orleans for the murder of the chief of police of New Orleans, and Abbagnato and five of the coaccused had been acquitted by the verdict of the jury, and mistrial had been found in the case of three others of the coaccused. Pending further legal proceedings all the coaccused, including those acquitted and those as to whom there had been a mistrial, were reincarcerated in the New Orleans parish prison, where they met their deaths at the hand of a mob, as stated above.

At the trial the jury found for the plaintiff, and judgment for the plaintiff was entered on the verdict. The defendant brought error. The case was heard before the Circuit Court of Appeals, Fifth Circuit.

Judge PARDEE delivered the opinion of the court, saying in part:

Rights of Italians by treaty same as those of United States citizens.

The treaty between the kingdom of Italy and the United States proclaimed November 23, 1871, guaranties to the citizens of either nation in the territory of the other "the

most constant protection and security for their persons and property," and further provides that "they shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives." Treaty of 1871, art. 3 (17 Stat. 845). This treaty applies to this case only so far as to require that the rights of the plaintiff shall be adjudicated and determined exactly the same as if she were, and her deceased son had been, a native of the United States. . . .

Liability of municipalities in damages for injury at the hands of a mob.

The city of New Orleans, by her pleadings, admits the gross negligence charged in the petition in the performance of the duties devolving upon the municipality under the constitution and laws of the state above referred to, whereby Abbagnato lost his life at the hands of a mob while in the custody of the law; and the question presented in this case is whether, on such admission of facts, the city can be held liable in damages. It is well settled that at common law no civil action lies for injury to a person which results in his death. . . . The rule is the same under the civil law, according to the decisions of the Louisiana supreme court. . . . In the absence of a statute giving a remedy, public or municipal corporations are under no liability to pay for the property of individuals destroyed by mobs or riotous assemblages. . . .

In the case of State *v.* Mayor, etc., of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, the supreme court of the United States held that the right to demand reimbursement from a municipal corporation for damages caused by a mob is not founded on contract. It is a statutory right, and may be given or taken away at pleasure. . . .

If this be the rule with regard to the liability of municipal corporations for damages to property committed by mobs or riotous assemblages, a fortiori it must be the rule with regard to the liability of municipal corporations for damages resulting in the loss of life from the acts of mobs or riotous assemblages. The reason of the rule is obvious. Actions to recover from municipal corporations damages resulting from the acts of mobs and riotous assemblages are actions to hold such corporations liable in damages for a failure to preserve the public peace. The preservation of the public peace primarily devolves upon the sovereign. Under our system of government, the state is that sovereign. U. S. *v.* Cruikshank, 92 U. S. 542–553; Western College *v.* City of Cleveland, 12 Ohio

Reasons for rule.

St. 377. When, by the action of the state, a municipal corporation is charged with the preservation of the peace, and empowered to appoint police boards and other agencies to that end, the corporation pro tanto is charged with governmental functions in the public interest and for public purposes, and is entitled to the same immunity as the sovereign granting the power for negligence in preserving the public peace unless such liability is expressly declared by the sovereign. This proposition is so well recognized that not a well-considered, adjudicated case can be found in the books where, in the absence of an express statute, any municipality has been held liable for the neglect of its officers to preserve the peace. . . .

Exemption of municipalities recognized in Louisiana.

The exemption of municipalities from liability to suits for damages for the negligence of officers and agents in the execution of the governmental functions granted by the state, in the public interest, and in the absence of statutory liability, is recognized in Louisiana, as shown by the decisions of the supreme court of the state. . . . It follows, therefore, that in order to recover damages against the city of New Orleans for the taking of human life by a mob in said city, no matter what the negligence of the city officials may have been, there must be a statute of the state of Louisiana expressly or by necessary implication giving a remedy in such cases. . . .

No damages.

As we find no law of the state of Louisiana giving a remedy in damages against a municipal corporation for the acts done by a mob resulting in the loss of human life, we are compelled to reverse the judgment of the court below.

Arrest of Deserters under Foreign Flag in Home Jurisdiction.

PROCEDURE RECOMMENDED.

In 1893 deserters from the U. S. S. *Chicago* were arrested on board the British steamer *Berlin* in the harbor of New York. As some of these deserters were enrolled on the articles of the vessel, and questions of identity, etc., might have arisen, it was deemed wise to have the arrest on board made by the local police instead of by naval officers direct.

This course was suggested by the British ambassador and adopted by the Department of State in its letter of advice to the Navy Department. As a matter of procedure it is desirable from many points of view to have such arrests made through the aid of local police.

American Citizens Exiled from Foreign Countries for Cause.

As to their right to reenter without permission.

The following quotation is from a letter to the Secretary of the Navy from the Secretary of State, dated July 15, 1899, respecting Americans who had been allowed to leave a foreign country in which they had been implicated in an insurrection. The position is taken that the American Government can not intervene in their behalf should they return to that foreign country and be recaptured:

Case of certain American citizens in Nicaragua.

Sir: I have the honor to acknowledge the receipt of your letter of the 12th ultimo, inclosing a copy of one to you from Lieutenant-Commander Kimball, U. S. N., commanding officer of the *Vixen*, at Bluefields, in which he requests general instructions as to the policy of this Government respecting the protection of such American citizens as, having taken part in the recent insurrection at that place, were allowed to leave the country, but who may again return thither and be apprehended and prosecuted by the Nicaraguan authorities.

You request to be advised of the views of this Department on the subject.

Instruction to U. S. consul at San Juan del Norte.

In reply I have the honor to inform you that an instruction, a copy of which is herewith inclosed, was sent to our consul at San Juan del Norte on May 13 last, informing him that Americans who were implicated in that insurrection and who have returned to Nicaragua have placed themselves beyond the power of this Government to intervene in their behalf, should they be recaptured.

The cases thus foreshadowed do not come under either the Barrundia or the Gomez case, referred to by Lieutenant-

Commander Kimball. These persons were natives of the country, in transit, and on board an American ship entering a port of the country without intent to land. The 33 men in question were expelled from Nicaraguan territory, and it is apprehended that they may attempt to reenter Nicaraguan jurisdiction. Many, if not most of them are understood to be citizens of the United States.

Proper action for a naval commander.

Effort should be made to warn such persons in time of the risk they run in reentering Nicaragua, and if occasion require, they might be temporarily received on an American naval vessel before they land, and before any process of arrest under due warrant of law be attempted against them. If, however, they actually land, or are arrested by judicial authority on a merchant ship in port before endeavoring to land, the naval commander could not claim their release or delivery to him, but would have to limit his action to the exercise of good offices so far as possible, in conjunction with the consular representatives of the United States, to secure for them fair and open process of law, with every opportunity for defense, and if convicted, leniency of treatment.

Submarine Cables in Enemy Country.

SUBJECT TO DAMAGE AS INCIDENT OF WAR.

(Opinions of Attorney-General of United States, Vol. XXII, p. 315.)

The following is a portion of an opinion rendered by the Attorney-General of the United States "relative to a claim of the British Eastern Extension Australasia and China Telegraph Company for damages and losses alleged to have been sustained in consequence of the cutting of its cable at Manila during the war with Spain and in response to a request for an opinion as to whether this Government is in any way liable for those damages and losses:"

No ground for indemnity for cutting of neutral cable in enemy waters.

Property of a neutral permanently situated within the territory of an enemy is, from its situation, liable to damage from the lawful operations of war, which this cutting is conceded to have been, and no compensation is due for such damage.

It is said, however, that this rule has never been applied to a cable; that the whole utility of the cable over many

miles is as much destroyed by cutting it in territorial waters as by cutting it on the high seas, which last act, it is claimed, would undoubtedly entitle the owners to compensation; and that the United States admiral did not merely aim at preventing the use of the cable by the Spaniards, but also at using it himself.

Do these reasons withdraw this property from the rule which has been stated?

In the first place, that is a rule applying to property of a neutral which he has placed within the territory of our enemy, which property our necessary military operations damage or destroy. It takes no account of the character of the property, but only of its location, and no account of any motives of its owner or of the military officer who finds it necessary to meddle with it in hurting the enemy. He sees it across his path and brushes it away, and the rule cited says that the owner, by putting his property in the country, took the chance of a war against it and of all lawful military acts to carry the war to a successful issue.

It argues nothing that cables have not heretofore been the subject of any discussion of this rule. The same might be said of many kinds of property, either because they happened not to be injured or because the rule was so well understood that a discussion was deemed superfluous. It is necessary to show why the cable property is exempt from the rule, and not that the rule has ever been applied to it.

* * * * * * *

I am of the opinion, therefore, that upon the law of the case there is no ground for indemnity.

Continuous Voyages.

CASE OF THE BUNDESRATH IN THE SOUTH AFRICAN WAR.

(British Parliamentary Paper, Africa No. 1, 1900, Cd 33.)

During the South African war the German mail steamer *Bundesrath*, bound for Delagoa Bay, was reported from Aden as suspected of carrying ammunition for the enemy, also with carrying persons intending to be combatants against the British forces in South Africa. The *Bundesrath* was seized at a later date by H. M. S. *Magicienne* and brought into

Durban. The mails of the *Bundesrath* were released and turned over to the German vessel of war *Condor*. No contraband of war being found on the *Bundesrath*, the vessel and cargo were released. In the correspondence that arose concerning this case the positions of the British and German Governments were stated in the following letters:

Count Hatzfeldt to the Marquess of Salisbury. (*Received January 4.*)

[Translation.]

GERMAN EMBASSY, LONDON, *January 4, 1900.*

Views of German Government.

MY LORD, With reference to the seizure of the German steamer "Bundesrath" by an English ship of war, I have the honor to inform your excellency, in accordance with instructions received, that the Imperial Government, after carefully examining the matter and considering the judicial aspects of the case, are of opinion that proceedings before a Prize Court are not justified.

This view is grounded on the consideration that proceedings before a Prize Court are only justified in cases where the presence of contraband of war is proved, and that, whatever may have been on board the "Bundesrath," there could have been no contraband of war, since, according to recognized principles of international law, there can not be contraband of war in trade between neutral ports.

This is the view taken by the British Government in 1863 in the case of the seizure of the "Springbok" as against the judgment of the American Prize Court, and this view is also taken by the British Admiralty in their "Manual of Naval Prize Law" of 1866.

The Imperial Government are of opinion that, in view of the passages in that Manual: "A vessel's destination should be considered neutral, if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral," and, "the destination of the vessel is conclusive as to the destination of the goods on board," they are fully justified in claiming the release of the "Bundesrath" without investigation by a Prize Court, and that all the more because, since the ship is a mail-steamer with a fixed itinerary, she could not discharge her cargo at any other port than the neutral port of destination.

In view of what is stated above, I have the honor to request your Excellency, in accordance with instructions from the Imperial Government, and with the reservation of what may further be decided, to order the release of the "Bundesrath," and since she was seized more than a week ago and the Imperial Government have not yet been informed of the reasons for the seizure, I should be obliged if I could be favored with a reply at your earliest convenience.

I have, etc., P. HATZFELDT.

The Marquess of Salisbury to Sir F. Lascelles.

FOREIGN OFFICE, *January 10, 1900.*

SIR, I transmit to your Excellency herewith the translation of a note which I have received from the German Ambassador at this Court with regard to the seizure of the German steamer "Bundesrath" by Her Majesty's ship "Magicienne," on suspicion of carrying contraband of war destined for the South African Republics.

In this note Count Hatzfeldt states that the German Government, after careful examination of the judicial aspects of the case, are of the opinion that proceedings before a Prize Court are not justified. They base this view on the doctrine that, according to the recognized principles of international law, no question of contraband of war arises in trade between neutral ports. In support of this argument they cite the view which they state "to have been taken by Her Majesty's Government in 1863 in the case of the seizure of the "Springbok," as against the Judgment of the United States' Prize Court, and that which they consider to be taken "by the British Admiralty in their 'Manual on Naval Prize Law' of 1866."

Before examining the doctrine thus put forward by the German Government, it will be desirable to remove some errors of fact in regard to the authorities which they cite.

Views of British Government.

It is not the case that the British Government in 1863 raised any claim or contention against the Judgment of the United States' Prize Court in the case of the "Springbok." On the first seizure of that vessel, and on an *ex parte* and imperfect statement of the facts by the owners, Earl Russell, then Secretary of State for Foreign Affairs, informed Her Majesty's Minister at Washington that there did not appear to be any justification for the seizure of the vessel and her cargo, that the supposed reason, namely, that

Views of British Government.

there were articles in the manifest not accounted for by the captain, certainly did not warrant the seizure, more especially as the destination of the vessel appeared to have been *bonâ fide* neutral, but that, inasmuch as it was probable that the vessel had by that time been carried before a Prize Court of the United States for adjudication, and that the adjudication might shortly follow, if it had not already taken place, the only instruction that he could at present give to Lord Lyons was to watch the proceedings and the Judgment of the Court, and eventually transmit full information as to the course of the trial and its results.

The Prize Court of the United States, in a long and considered Judgment, decreed confiscation both of the vessel and the cargo. The owners applied for the intervention of Her Majesty's Government, and forwarded in support of their application an opinion by two English Counsel of considerable eminence.

The real contention advanced in this opinion was that the goods were, in fact, *bonâ fide* consigned to a neutral at Nassau. It cannot, therefore, be adduced in support of the doctrine now advanced by the German Government. But Her Majesty's Government, after consulting the Law Officers of the Crown, distinctly refused to make any diplomatic protest or enter any objection against the decision of the United States' Prize Court, nor did they ever express any dissent from that decision on the grounds on which it was based.

The volume which is described in Count Hatzfeldt's note as "The Manual of Naval Prize Law of the British Admiralty," and from which Count Hatzfeldt quotes certain phrases as expressing the view of the Lords Commissioners on this subject, is, in fact, a book originally compiled by Mr. (now Sir Godfrey) Lushington, which was published under the authority of the Lords Commissioners as stating in a convenient form the general principles by which Her Majesty's officers are guided in the exercise of their duties; but it has never been asserted and can not be admitted to be an exhaustive or authoritative statement of the views of the Lords Commissioners. The preface to the book states that it does not treat of questions which will ultimately have to be disposed of by the Prize Court, but which do not concern the officer's duty of the place and hour. The directions in this Manual, which for practical purposes were sufficient in the case of

wars such as have been waged by Great Britain in the past, are quite inapplicable to the case which has now arisen of war with an inland State, whose only communication with the sea is over a few miles of railway to a neutral port. In a portion of the Introduction the author discusses the question of destination of the cargo, as distinguished from destination of the vessel, in a manner by no means favorable to the contention advanced in Count Hatzfeldt's note. Moreover, Professor Holland, who edited a revised edition of this Manual in 1888, in a recent letter published in the "Times," has expressed an opinion altogether inconsistent with the view which the German Government endeavor to found upon the words of the Manual. Views of British Government.

In the opinion of Her Majesty's Government, the passage cited from the Manual, "that the destination of the vessel is conclusive as to the destination of the goods on board," has no application to such circumstances as have now arisen.

It cannot apply to contraband of war on board of a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country.

The true view in regard to the latter category of goods is, as Her Majesty's Government believe, correctly stated in paragraph 813 of Professor Bluntschli's "Droit International Codifié," as follows (I cite from the French translation of 1874, 2nd edition, of the work of this eminent German jurist):—

"Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrebande de guerre et la confiscation sera justifiée."

Her Majesty's Government are unable therefore to agree that there are grounds for ordering the release of the "Bundesrath" without examination by the Prize Court as to whether she was carrying contraband of war belonging to, or destined for, the South African Republics. But they fully recognize how desirable it is that this examination should be carried through at the earliest possible moment, and that all proper consideration should be shown for the owners and for innocent passengers and merchandise on board of her. Repeated and urgent instructions have been sent by telegraph for this purpose, and arrange-

ments have been made for the speedy transmission of the mails.

Your excellency will address a note to the German Minister for Foreign Affairs containing the above observations.

I am, etc.,

SALISBURY.

The Marquess of Salisbury to Sir F. Lascelles.

FOREIGN OFFICE, *January 11, 1900.*

SIR, Baron von Eckardstein called on me yesterday, and in the course of conversation on the subject of the recent seizures of German mail-steamers, informed me that in view of the protest which I had made against the position taken up by the German Government that there could not be any question of contraband of trade between neutral ports, they had decided to abstain from pressing or discussing their opinion for the present in order to facilitate a speedy and amicable settlement.

I am, etc., SALISBURY.

STATUS OF AUXILIARY CRUISERS IN TIME OF WAR.

CASE OF THE UNITED STATES CRUISER YALE AT THE TIME OF THE CAPTURE OF THE SPANISH STEAMER RITA DURING THE SPANISH-AMERICAN WAR.

(Fed. Rep., vol. 89, p. 763.)

United States District Judge Brawley, October 13, 1898:

Conditions of Yale's service as an auxiliary cruiser.

As the proof shows that the Rita was an unarmed merchant vessel, the captors are entitled to one-half of the prize money, and Capt. W. C. Wise, being in command of the capturing vessel and on independent duty, is entitled to three-twentieths of the amount allowed to the captors. No other vessel being in sight and entitled to share, the only question for determination is as to the distribution of the residue, and this question arises out of the somewhat anomalous character of the capturing vessel. The capture was made May 8, 1898, by the United States cruiser Yale, which prior to April 30, 1898, was known as the "City of Paris." She belonged to the International Navigation Company, and was of the class of steamships which, under

the provisions of the act of March 3, 1891, was subject to be taken by the United States as a cruiser or transport, upon payment of her actual value. By a charter party and supplementary agreement entered into April 30, 1898, between the company and the government, acting through the secretary of the navy, possession of the ship was transferred to the government. By it she was heavily armed, and converted into an auxiliary cruiser, and her name changed. The charter party provided that the ship should be "manned, victualed, and supplied at the expense of the charterer," which is also to pay all other expenses whatsoever, and return the same in good repair, less ordinary wear and tear, at the termination of the chartering, which was to be at the will of the charterer. The supplementary agreement provided that the ship was "to be manned by her regular officers and crew, and in addition thereto was to take on board two naval officers, a marine officer, and a guard of thirty marines, and was to be victualed and supplied with two months' provisions, and about four thousand tons of coal; the actual cost to the owners of such additional equipment and services to be reimbursed by the charterer upon bills to be certified by the senior naval officer on board." There were also provisions protecting the owner against all expenses and liability, and a provision that during the continuation of the supplementary agreement the steamship was to be "under the entire control of the senior naval officer on board."

* * * * * * *

Civilian employees on board Yale "in the service" of the government.

The evidence fully establishes the fact that the petitioner Watkins and others of the crew of the City of Paris, mentioned in his petition, although not formally enlisted, were "doing duty on board and borne upon the books." They were charged with the navigation of the ship. There was no other crew on board capable of performing that service. From them was selected the prize master and crew which brought the Rita into port for condemnation. If they were not "in the service" of the government while performing that mission, they incurred the hazard of being considered as pirates.

Military Occupation.

INSTRUCTIONS OF THE PRESIDENT OF THE UNITED STATES AS TO THE OCCUPATION OF SANTIAGO DE CUBA.

(Proclamations and Decrees during the War with Spain, p. 83.)

General Orders, No. 101.

War Department, Adjutant-General's Office, *Washington, July 18, 1898.*

The following, received from the President of the United States, is published for the information and guidance of all concerned:

Executive Mansion, *Washington, July 13, 1898.*

To the Secretary of War.

Sir: The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the Province of Santiago, and the occupation of the territory by the forces of the United States, render it necessary to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.

The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to anuounce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, cooperate with the United States in its efforts to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible.

Security of persons and property.

Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The judges and the other officials connected with the administration of justice may, if they accept the supremacy of the United States, continue to administer the ordinary law of the land, as between man and man, under the supervision of the American commander in chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so.

Municipal laws hold, except for cause.

While the rule of conduct of the American commander in chief will be such as has just been defined, it will be his duty to adopt measures of a different kind, if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether, to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary. In the exercise of these high powers, the commander must be guided by his judgment and his experience and a high sense of justice.

Other procedure in case of necessity.

One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the government of the country in its own right, and all arms and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the state he may hold and administer, at the same time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All

Public property.

public means of transportation, such as telegraph lines, cables, railways, and boats belonging to the state may be appropriated to his use, but unless in case of military necessity they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or of works of science or art, is prohibited, save when required by urgent military necessity.

Private property.

Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained.

Contributions, taxes, and duties.

While it is held to be the right of the conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army.

Private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given.

Occupied ports opened.

All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war upon payment of the prescribed rates of duty which may be in force at the time of the importation.

WILLIAM MCKINLEY.

By order of the Secretary of War:

H. C. CORBIN,
Adjutant-General.

Right of Military Authorities to Impose Tariff upon Imports during Military Occupation.

Attorney-General J. W. Griggs (Opinions Attorney-General, vol. 22, p. 562) says, August 10, 1899:

According to the well-settled principles of public law relating to territory held by conquest, and according to the adjudication of the Supreme Court of the United States in *Cross* v. *Harrison*, the military authorities in possession, in the absence of legislation by Congress, may make such rules or regulations and impose such duties upon merchandise imported into the conquered territory as they may, in their judgment and discretion deem wise and prudent.

As to the Assumption of Consular Functions by Naval Officers in Territory held by Military Occupation.

The following letter explains the opinion of the Department of State in matters of this kind:

Department of State,
Washington, November 3, 1898.

The Honorable The Secretary of the Navy.

Sir: I am advised by the Secretary of War, upon information received from Major General J. F. Wade, U. S. V., President of the United States Commission for the Evacuation of the Island of Cuba, that the senior officer commanding a United States naval vessel in the harbor of Habana has, in virtue of an existing statute or regulation, assumed the functions of United States Consul in and for the port of Habana.

It is presumed that the statute referred to is Sec. 1433, Title 15, Chap. 2, of the U. S. laws relating to Navy and Marine Corps (p. 297).

Case at Habana in 1898.

During the suspension of relations between the governments of the United States and Spain, consequent upon a state of war, and still continuing notwithstanding the stipulated suspension of hostilities between them, all direct diplomatic and consular representation of the United States in places and ports within Spanish control is necessarily suspended. During such suspension resort has been

had to the usual privilege, recognized by international law, of placing the interests of American citizens in the respective ports and places under the care of the respective British diplomatic or consular representative whose good offices in this relation have been recognized and admitted by the government and authorities of Spain. The acting Consul-General of Great Britain at Habana, Mr. Lucien J. Jerome, is so acting at the present time and will continue to do so until, by the final evacuation, the control of that port shall pass for the time being into the hands of the military authorities of the United States, when, of course, there would be no further occasion for a consular representative there.

In view of the fact that adequate provision exists for consular representation of the United States at Habana during the current interval and in view, also, of the further circumstances that the same technical continuance of a state of war which would prevent the titular consular-general of the United States at Habana from returning to his post, would prevent the substitution of a new consular representative whose power to act would depend upon recognition by the local authorities and whose functions are, by the statute above referred to, limited to mariners of the United States, I have the honor to request that proper instructions be given to the naval officer in the premises.

I have the honor to be, Sir,
Your obedient servant,

JOHN HAY.

INSURGENT BLOCKADE.

CERTAIN CONCLUSIONS OF THE DEPARTMENT OF STATE.

In the following letter addressed to the Secretary of the Navy the Secretary of State discusses the question of insurgent blockade and formulates certain conclusions. The correspondence in full may be found in International Law Situations, Naval War College, 1902, pp. 79–83, embodied in a somewhat full discussion of the subject.

DEPARTMENT OF STATE,
Washington, D. C., November 15, 1902.

The HONORABLE
The SECRETARY OF THE NAVY.

SIR: I have the honor to acknowledge the receipt of the letter of the Acting Secretary of the Navy (346855 B), under date of November 12, inclosing copy of a letter from the president of the Naval War College containing certain suggestions respecting interference with commerce by insurgent vessels, and requesting my comments thereon.

While as a rule this Department is reluctant to express, of record, general opinions or comments upon questions of a more or less academic character, the papers you submit to me, and particularly the statement prepared by Professor Wilson and submitted to Captain F. E. Chadwick, may justify some general observations.

Insurgent blockade is exceptional.

Cases involving assertion of the rights of insurgent "blockade" are necessarily exceptional, to be considered as governed by exigent circumstances rather than by doctrine.

How dealt with.

In dealing with concrete cases arising within the official cognizance of the Department of State and embracing points of international law like those presented in Mr. Wilson's memorandum, this Department endeavors to interpret the consensus of international law authorities with due regard to the precise significance of the term "blockade."

Blockade, strictly speaking, and measures marking its exercise.

Blockade of enemy ports is, in its strict sense, conceived to be a definite act of internationally responsible sovereign in the exercise of a right of belligerency. Its exercise involves the successive stages of, first, proclamation by a sovereign state of the purpose to enforce a blockade from an announced date. Such proclamation is entitled to respect by other sovereigns conditionally on the blockade proving effective. Second, warning of vessels approaching the blockaded port under circumstances preventing their having previous actual or presumptive knowledge of the international proclamation of blockade. Third, seizure of a vessel attempting to run the blockade. Fourth, adjudication of the question of good prize by a competent court of admiralty of the blockading sovereign.

Insurgent "blockade," on the other hand, is exceptional, being a function of hostility alone, and the right it involves is that of closure of avenues by which aid may reach the enemy.

Unrecognized insurgents.

In the case of an unrecognized insurgent, the foregoing conditions do not join. An insurgent power is not a sovereign maintaining equal relations with other sovereigns, so that an insurgent proclamation of blockade does not rest on the same footing as one issued by a recognized sovereign power. The seizure of a vessel attempting to run an insurgent blockade is not generally followed by admiralty proceedings for condemnation as good prize, and if such proceedings were nominally resorted to a decree of the condemning court would lack the title to that international respect which is due from sovereign states to the judicial act of a sovereign. The judicial power being a coordinate branch of government, recognition of the government itself is a condition precedent to the recognition of the competency of its courts and the acceptance of their judgments as internationally valid.

Insurgents generally lack admiralty courts entitled to international respect.

Recognition of belligerency by one or a few powers carries no general right of insurgent blockade.

To found a general right of insurgent blockade upon the recognition of belligerency of an insurgent by one or a few foreign powers would introduce an element of uncertainty. The scale on which hostilities are conducted by the insurgents must be considered. In point of fact, the insurgents may be in a physical position to make war against the titular authority as effectively as one sovereign could against another. Belligerency is a more or less notorious fact of which another government, whose commercial interests are affected by its existence, may take cognizance by proclaiming neutrality toward the contending parties, but such action does not of itself alter the relations of other governments which have not taken cognizance of the existence of hostilities. Recognition of insurgent belligerency could merely imply the acquiescence by the recognizing government in the insurgent seizure of shipping flying the flag of the recognizing state. It could certainly not *create* a right on the part of the insurgents to seize the shipping of a state which has not recognized their belligerency.

It seems important to discriminate between the claim of a belligerent to exercise quasi sovereign rights in accordance with the tenets of international law and the conduct of hostilities by an insurgent against the titular government.

Sovereign rights extend to high seas; insurgent rights are essentially domestic.

The formal right of the sovereign extends to acts on the high seas, while an insurgent's right to cripple his enemy by any usual hostile means is essentially domestic within the territory of the titular sovereign whose authority is

contested. To deny to an insurgent the right to prevent the enemy from receiving material aid can not well be justified without denying the right of revolution. If foreign vessels carrying aid to the enemies of the insurgents are interfered with within the territorial limits, that is apparently a purely military act incident to the conduct of hostilities, and, like any other insurgent interference with foreign property within the theatre of insurrection, is effected at the insurgent's risk.

To apply these observations to the four points presented in Professor Wilson's memorandum, I may remark:

Certain conclusions as to insurgent blockade.

1. Insurgents not yet recognized as possessing the attributes of full belligerency can not establish a blockade according to the definition of international law.

2. Insurgents actually having before the port of the state against which they are in insurrection a force sufficient, if belligerency had been recognized, to maintain an international law blockade, may not be materially able to enforce the conditions of a true blockade upon foreign vessels upon the high seas even though they be approaching the port. Within the territorial limits of the country, their right to prevent the access of supplies to their enemy is practically the same on water as on land—a defensive act in the line of hostility to the enemy.

Insurgents never justified in treating a neutral vessel in internal waters as an enemy.

3. There is no call for the Government of the United States to admit in advance the ability of the insurgents to close, within the territorial limits, avenues of access to their enemy. That is a question of fact to be dealt with as it arises. But in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters—their only right being, as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents. The question of the nature and mode of the redress which may be open to the government of the injured foreigners in such a case hardly comes within the purview of your inquiry, but I may refer to the precedents heretofore established by this Government in enunciation of the right to recapture American vessels seized by insurgents.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

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